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**Coastal Sunbelt Produce, Inc. and Mayra L. Sagastume.** Case 05–CA–036362

September 20, 2012

**DECISION AND ORDER**

BY CHAIRMAN PEARCE, AND MEMBERS HAYES  
AND BLOCK

On February 17, 2012, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order.

<sup>1</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent asserts that it has reserved the right to argue that Board Members Block and Griffin should be disqualified from ruling in this proceeding on the ground that their recess appointments to the Board by the President were invalid. For the reasons set forth in *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012), we reject this argument.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

<sup>3</sup> We adopt the judge's conclusions that the Respondent unlawfully interrogated Mayra L. Sagastume in violation of Sec. 8(a)(1) of the Act and unlawfully discharged her in violation of Sec. 8(a)(3) and (1). With respect to the evidence of animus, the Respondent has excepted to the judge's reliance on the Respondent's antiunion campaign, its hiring of an outside consultant, and CEO John Corso's statement to employees that he felt stabbed in the back by the organizing campaign. The Respondent contends that the foregoing actions are protected by Sec. 8(c) of the Act. We find it unnecessary to rely on that evidence as proof of animus, because we find that the record amply demonstrates animus for the other reasons stated by the judge. We further find it unnecessary to rely on the judge's inferences as to Corso's knowledge of union activity on the part of Luis Hernandez, Sagastume's husband. Supervisors Joey Saia and Julio Ramos both knew of Hernandez' organizing activity, and Sagastume admitted her pronoun sentiments to Ramos hours before the Respondent decided to discharge her. We impute the supervisors' knowledge to the Respondent, in the absence of credited testimony to the contrary. *Gestamp South Carolina, LLC.*, 357 NLRB No. 130, slip op. at 10 (2011).

Chairman Pearce and Member Block additionally do not rely on the judge's discussion of agency at footnote 77 of his decision, but instead affirm the judge's finding that the Respondent is liable for its supervisors' coercive statements regardless of specific authorization.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Coastal Sunbelt Produce, Inc., Savage, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 20, 2012

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Mark Gaston Pearce, Chairman

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Brian E. Hayes., Member

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Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*M. Anastasia Hermosillo, Esq.*, for the Acting General Counsel.  
*Kara M. Maciel, Esq.*, of Washington, D.C. and *Evan Rosen, Esq.*, of Atlanta, Georgia, for the Respondent.  
*Mayra Sagastume* of Jessup, Maryland, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

ERIC M. FINE, Administrative Law Judge. This case was tried in Baltimore, Maryland, on July 18 to July 22, 2011. The charge was filed by Mayra L. Sagastume on January 5, 2011 against Coastal Sunbelt Produce, Inc.<sup>1</sup> The complaint issued on March 31, 2011, as amended at the hearing, alleges that Coastal Sunbelt Produce, Inc., (referred to herein as Respondent or CSPC)<sup>2</sup> through Julio Ramos on or about November 16 interrogated Sagastume by asking her about her husband's union activities; and that on or about November 18 Respondent terminated Sagastume because Sagastume formed, joined, or assisted the Drivers, Chauffeurs and Helpers, Local Union No. 639 a/w the International Brotherhood of Teamsters (the Union); engaged in concerted activities; and to discourage employees from engaging in these activities in violation of Section 8(a)(1) and (3) of the Act.<sup>3</sup>

On the entire record, including my observation of the witnesses' demeanor, and after considering the briefs filed by the

<sup>1</sup> All dates are in 2010 unless otherwise indicated.

<sup>2</sup> While the complaint names Respondent as Coastal Sunbelt Produce, Inc., Respondent was referred to on the record by Respondent's witnesses as Coastal Sunbelt Produce Company (CSPC). Respondent concedes in its posthearing brief that Coastal Sunbelt Produce, Inc. is appropriately alleged as the responsible party for Sagastume's termination.

<sup>3</sup> The complaint asserts Sagastume was terminated because of her union activities. However, counsel for the Acting General Counsel stated at the outset of the hearing the theory of the complaint was Sagastume was terminated because of her husband's union activities in violation of Sec. 8(a)(1) and (3) of the Act. Respondent was on notice of the Acting General Counsel's theory, and the issue was fully litigated and briefed by the parties.

Acting General Counsel and Respondent, I make the following<sup>4</sup>

#### FINDINGS OF FACT

##### I. Jurisdiction

Respondent, a corporation, with an office and place of business in Savage, Maryland, has been engaged in the business of providing fresh produce and dairy products to restaurant chains, independents, hotels, businesses, and food service companies throughout the east coast. During the 12-month period prior to March 31, 2011, a representative period, Respondent sold and shipped goods valued in excess of \$50,000 to states outside of Maryland. Respondent admits and I find it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act and the Union is a labor organization under Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. Respondent's Operations

Respondent admitted at the hearing the following individuals maintain the titles next to their names and they are supervisors and agents of Respondent: John Corso, chief executive officer; Mike Flanagan, chief financial officer; Erin Morgan, human resources manager; and Julio Ramos, supervisor. It was stipulated at the hearing that during the fall of 2010, Jim McWhorter was the vice president of sales; Jason Lambros was the vice president of purchasing; Tracy Moore was the vice president of operations; Stalio Callas was the operations day manager; Jennifer Caplinger was the transportation manager then became the logistics manager; Justin Callas was the night manager; Joey Saia was the fleet manager and that all the aforementioned were supervisors and agents of Respondent during the specified time period.

Coastal Sunbelt, Inc. (CSI) is a holding company for three operating companies. CSI only employs executive managers. CSI is a holding company for: Coastal Sunbelt Produce Company (CSPC), a distribution business; East Coast Fresh Cuts (ECFC), a processing and manufacturing business; and for Coastal Sunbelt Leasing (CSL) a leasing company which leases assets to CSPC and ECFC.<sup>5</sup> Corso is the president and CEO of CSI and CSPC. Ross Foca is the president and CEO of ECFC. Foca reports to Corso. Foca testified that although he is president of ECFC, Foca is not employed by that company. Rather, Foca has been employed by CSI. Foca's paycheck is from CSI, but the money comes from ECFC since CSI has no revenue.<sup>6</sup> ECFC employees receive their pay checks from ECFC. Foca

testified the money he is paid is allocated to the operating company which is ECFC. Foca's benefits and taxes are allocated to ECFC. Foca testified that all the individuals reporting to him work for ECFC, except for Zeleznik, who is also employed and paid by CSI. Zeleznik's pay is allocated to ECFC.

Corso testified ECFC and CSPC are different businesses. ECFC is a manufacturing company, which means it changes the function of its product. CSPC is a distribution company. It receives products and then redistributes them to customers. The two companies are separate legal entities, with separate tax identification. Corso testified ECFC sells processed fruits and vegetables to CSPC which CSPC marks up and then sells to their food service customers. CSPC also supplies product to ECFC in its whole form which ECFC cuts up and sells. Foca testified CSPC distributes cases of produce primarily to restaurants and hotels. Their customers order a variety of produce, such as apples, oranges, and tomatoes by the case. CSPC supplies its customers 6 days a week. Foca testified ECFC is a complimentary business to CSPC. Foca testified he was formerly the chief financial officer of both CSPC and ECFC. Corso testified in December 2007, they acquired L & M Produce.

Foca testified ECFC is a food processor or manufacturing company. ECFC takes produce, washes it, slices it, dices it, and repackages it. Foca testified the products they make include fresh salsa and other items that can be found in grocery stores, which is about 50 percent of ECFC's business. The other half of the business is selling to distributors like CSPC, Sysco, and U.S. Foods. ECFC also sells to manufacturers, like itself. Foca testified ECFC changes the product from its original state, and has to follow strict quality systems. They have to meet retail guidelines in that many retailers want their processors to be safe quality food certified. ECFC has certain food quality certifications. For example, ECFC can put a USDA stamp on their product to be sold on the shelf, which makes ECFC different than CSPC.

Foca testified ECFC and CSPC are complimentary businesses and they sell product to each other. Foca testified the transactions between the two are arms length. When ECFC buys produce from CSPC an invoice is generated, and paid by an ECFC check and vice versa. Foca testified taxes on the state level are separate for each company. ECFC and CSPC are housed in the same building. The rent is split between the two based on square footage used by each. Foca testified ECFC contracts with CSPC, along with three other trucking companies to ship ECFC products. CSPC bills ECFC by the pound. Foca testified he was the CFO of CSPC until the fall of 2009. Foca testified in the fall of 2010, he became a board member of CSI. As such, Foca sits in on all of CSPC's operating meetings at the board level, which were formerly on a quarterly basis and at the time of the hearing monthly. Foca testified there were 900 employees in the company in that CSPC has about 550 employees, and ECFC has about 350 employees all working at the same facility.

##### B. The Union Campaign

Scott Clark works for the Union as an organizer. He has held that position since October 2010. Clark conducted the union campaign trying to organize the drivers at CSPC. He estimated CSPC employs about 200 drivers stating they had not

<sup>4</sup> In making the findings, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.*, 179 F. 2d 749, 754 (2d. Cir. 2), reversed on other grounds 340 U.S. 474 (1951). All testimony and evidence has been considered. If certain testimony or evidence is not mentioned it is because it is cumulative of the credited evidence, not credited, or not essential to the findings herein. Further discussion of the witnesses' credibility is set forth below.

<sup>5</sup> As set forth above, CSPC is alleged in the complaint as Coastal Sunbelt Produce, Inc.

<sup>6</sup> Corso; Dave Zeleznik, the general manager and vice president of ECFC; Tracy Moore, vice president of operations of CSPC; Jason Lambros, vice president of purchasing for CSPC; and Mike Flanagan, the chief financial officer for CSPC and ECFC, among some others, are also employed and paid by CSI.

been previously organized.<sup>7</sup> Clark learned of the organizing campaign at CSPC from Local 639 Secretary/Treasurer John Gibson, who is Clark's supervisor. Gibson assigned Clark to work on the campaign in early October. Gibson worked on the campaign prior to Clark. The campaign had been going on for about a month before Clark took over. Clark testified he was informed that CSPC drivers Luis Hernandez and Hector Aguilera made the initial contact with Local 639.<sup>8</sup> Hernandez is Sagastume's husband. It is based on Hernandez' union activity that the Acting General Counsel contends Sagastume was unlawfully terminated. Clark testified he was informed the initial meeting with Union officials and CSPC's employees took place in September. Clark testified there were about 25 employees present. Clark did not attend this meeting.

Hernandez testified Sagastume is his wife and they were married in 1999 in Guatemala.<sup>9</sup> Hernandez started working for L & M Produce as a driver in March 1997 and he began working for CSPC as a driver when CSPC purchased L & M Produce.<sup>10</sup> Hernandez retained his L & M seniority when he was hired by CSPC. Hernandez' title at CSPC was CDL float driver. Hernandez did both local and over the road driving.<sup>11</sup>

Hernandez testified that in the summer of 2010 he had a conversation with co-workers discussing problems at the job. It was at a soccer field where workers from ECFC and CSPC were playing each other. Amongst those in attendance, was David Montenegro, who Hernandez identified as a supervisor from ECFC. Hernandez testified some of the employees were in favor of having a strike that Saturday and some thought of organizing a union. Hernandez testified the Saturday following the game; he had a conversation with Corso at the loading dock at work. Hernandez was coming in from his route. He testified all of the supervisors were there waiting for the drivers because there was a rumor of a strike. When Hernandez got down from his truck, Corso asked him if he knew anything about a strike. Hernandez told Corso that he did not think there would be a strike. Hernandez asked Corso to ask himself why the company would hire 10 drivers and at the end of the week 12 would leave. Corso stated maybe those people were not doing their job in an appropriate manner. Hernandez said maybe it was the supervisors who were not doing their job in a correct fashion. Hernandez testified there was no work stoppage.<sup>12</sup>

<sup>7</sup> Clark testified none of the estimated 900 employees working at the facility were organized.

<sup>8</sup> Luis Hernandez will be referred to as Hernandez. Alex Hernandez who works as a supervisor in the tomato department will be referred to as A. Hernandez.

<sup>9</sup> Hernandez testified he can read and write in Spanish and he understands some English. Hernandez testified through the use of an interpreter for most of his testimony. He voluntarily left CSPC's employ in January 2011.

<sup>10</sup> Hernandez testified McWhorter was the owner of L & M Produce.

<sup>11</sup> Acting General Counsel witness Javier Vargas Garcia (Vargas) was employed by CSPC when he testified. Vargas, like Hernandez, transferred to CSPC from L & M giving him 15 years of seniority with CSPC at the time of his testimony. Vargas testified his supervisor is Walter Vasquez, and prior to that Caplinger was his supervisor.

<sup>12</sup> Vargas testified the drivers began to express discontent about the way their then supervisor Caplinger treated them and they started to have meetings as a result. Vargas testified in the summer of 2010 he heard a rumor about a work stoppage. Respondent witness Ramos testified as to rumors of a work stoppage amongst the drivers in the fall stating there were rumors all over the place. Thus, Vargas and Ramos corroborated certain aspects of Hernandez testimony, which was un-

Hernandez testified that, after the meeting at the soccer field, the employees decided to organize a union, so Hector Aguilera and Hernandez went to Local 639's office and spoke to Gibson. Hernandez testified the problems they had related to their supervisor Caplinger not respecting the workers. During the meeting with Gibson, they started talking about problems at CSPC, including worker salaries. Hernandez testified they decided to organize and that there was going to be an organizing committee. There was a discussion about a second meeting. Gibson gave them cards and pamphlets to deliver to some of the workers who worked late and were not able to come to the meetings.

Hernandez identified a list containing the signatures of 25 drivers, dated September 8, who he testified attended a union meeting on that date. Hernandez' signature is on the list. Gibson ran the meeting which took place at Local 639. Hernandez and Aguilera told the other employees about the meeting. Hernandez identified the Union card he signed on September 8. Hernandez testified he received around 200 cards from Gibson. Hernandez testified he gave the rest of the cards out to co-workers for their signature.<sup>13</sup> After the cards were signed, Aguilera and Hernandez turned them over to Gibson. In addition to the meetings at the union hall, Hernandez attended union meetings at the restaurant Casave, some at a McDonald's, and some at his house. Only the ones that took place at the union hall had sign in sheets.<sup>14</sup>

On October 6, McWhorter, vice president of sales of CSPC, sent Corso an email, with the subject entitled "Driver Thing." The email reads:

John: Larry Hooker-one of the older back drivers-called me yesterday and told me that the black guys are now being approached to sign petitions. He told me that Javier approached him and said they had 120 signatures, blah, blah, blah.

My question is this: is there any way you and I can sit down with the leaders of this thing somewhere off site and have a talk with them?

I did not find Corso's testimony concerning this email to be convincing. Corso testified he did not know the reference to "Driver Thing" referred to a union campaign. When asked if he knew what the petition was about, Corso testified "it looked like this rumor was something was going on, clearly, but I--but it was a rumor. I mean, I hear rumors about everything every day." He maintained he did not know there was a union activity until he received the Union's October 13 request for recognition. Corso claimed he never had a conversation with McWhorter as to the subject of the petitions purportedly signed by 120 of his drivers. While McWhorter, a high level official at Respondent, was asking for a meeting with Corso, Corso incredibly claimed he did not follow up with McWhorter or ask

denied by Corso. I have credited Hernandez as to his conversation with Corso and as to the discussions at the soccer game.

<sup>13</sup> Vargas signed a union card on September 9, which he received from Hernandez. Vargas testified he was one of the organizers for the Union.

<sup>14</sup> Hernandez was on Local 639's organizing committee. Hernandez duties on the committee included speaking to Gibson and Clark about scheduling meetings. Hernandez made calls to employees during August through December 2010, and he distributed union literature to employees during September through the December election. The union meetings held at Hernandez home took place after Sagastume's termination.

him what the petitions were in reference to.

Corso's testimony disavowing knowledge pertaining to the content of McWhorter's email becomes all the more incredible when viewed against this backdrop. In the summer of 2010 when the drivers were discussing the possibility of a strike at Respondent, the news quickly spread throughout Respondent's facility and filtered up to Corso as set forth above. The discussions concerning a strike amongst the drivers also contained discussions concerning organizing a union. In fact, Hernandez reached out to Local 639, and on September 8 he attended a union meeting along with 24 other employees. It is likely; given this sequence of events that news of union activity amongst his employees reached Corso prior to his receipt of McWhorter's October 6 email almost a month later. Moreover, Corso was not the type to sit back and let things happen. He responded quickly and forcefully to the Union's request for recognition and election petition by hiring outside consultants and personally conducting many meetings amongst his employees to convince them against selecting a union. He also began changing the employees terms and condition of employment in October in order to quell unrest at his work force. I therefore do not credit Corso's claim that when he received an email from McWhorter entitled the "Driver Thing" that Corso did not follow up with McWhorter for clarification concerning the nature of the petitions and the identity of Javier. The timing of the petition signing by employees clearly refers to the employees signing union cards, as Corso surmised in his testimony. I have concluded Corso did follow up with McWhorter and that Corso was aware the email referenced employees signing union cards.

Corso testified that in early October: the Company created a suggestion box; and notified employees of a vacation policy change allowing them to take two weeks off in a row, rather than a week at a time. The new policy allowed them more time to travel home to their native country. The policy change was effective on January 1, 2011. Corso testified the change in the vacation policy was brought about by concerns raised by drivers. Corso also testified the bonus system for drivers was changed during this period to be more favorable to the drivers based on concerns expressed to him by some of the drivers.

On October 13, by certified mail, Gibson sent Corso a letter on behalf of CSPC's drivers requesting that CSPC recognize Local 639 as their collective-bargaining representative. The letter stated Local 639 was prepared to demonstrate a majority of the employees in the bargaining unit had designated Local 639 as their collective bargaining representative through a mutually agreeable third-party. Corso received the letter on October 15.<sup>15</sup> Corso testified when he first received notification from the Union, he had a meeting with all the drivers to let them know Respondent had received a request for voluntary recognition.<sup>16</sup> Corso testified he told the drivers they have a right to a free and fair and secret ballot election, and Corso was not going to voluntarily recognize the Union. Respondent responded to Gibson by letter from Attorney Jay Krupin, dated October 20, declining recognition of the Union until it was

certified by a Board conducted election.

Hernandez testified he attended a company meeting conducted by Corso in which Corso stated he received a letter from the Union. Hernandez credibly testified Corso stated he had made many changes in the company, and he asked how the employees could pay him back that way, that he felt he had been stabbed in the back. Hernandez testified that, during the meetings he attended, Corso stated he would never allow the Union to come into his company, that he had lawyers. Corso stated if they presented him with a contract years would pass before he would sign it. Hernandez testified different drivers attended different meetings based on scheduling. Vargas credibly testified he attended a meeting where a letter from the Union was mentioned. He testified Corso and Vasquez were present for the meeting, with about 20 to 30 drivers. Vasquez translated for Corso. Vargas testified the meeting was at the beginning of Respondent's campaign against the Union. Corso said he had heard rumors of a strike or work stoppage, so he talked to all of the drivers and wanted to know the reasons for their discontent. Vargas credibly testified as follows: Corso was very upset with the drivers. He stated he tried to change things in the company. For instance, he had changed supervisor Caplinger's position, who had been the subject of driver discontent. Corso wanted to know why the drivers were so discontent. Corso implied the drivers stabbed him in the back because he had tried to change things, and he had received a letter from the Union stating it wanted to represent the workers. Corso said he would not accept a union in his company, that there would be a process, there would be elections. Corso said due to the Union, he would not be able to offer raises to the employees because the Union had messed things up. Corso said if something happened after the elections, he would not accept the Union, he did not agree with that, and he could not fix anything until all of this was over. Corso said it was an involved process, and after the election if the Union won, he would not accept the Union in the company.<sup>17</sup>

On October 27 at 2 p.m., Corso held a phone conference meeting with individuals on Respondent's board of directors including Foca.<sup>18</sup> Most of the members of the board of directors were located in Atlanta. Corso identified an email he sent to the board of directors, including Foca on October 27 confirming the 2 p.m. meeting. The email stated "Attached is a

<sup>17</sup> I have found Hernandez and Vargas testified in a credible fashion concerning the meetings they attended.

<sup>18</sup> Like Corso, Foca claimed he first became aware of union activity at Respondent when they received the Union's October 13 letter requesting recognition. Foca testified he was aware of what was going on with the election, and as a manager he had attended meetings with the attorneys relating to what Foca was allowed to say and not to say. Foca testified he was aware the company's opinion "was we didn't need a union." Foca testified he discussed the Union with his employees. Foca testified it was also his opinion that the people worked better without a union. In this regard, on March 22, Foca sent an email to Corso and Flanagan containing an attachment about the Teamsters listing assertions of criminal convictions in the past concerning officials of the national union. The attachment also listed assets of Local 639, their membership and the number of unfair labor practice charges they filed since 2000. On October 27, Foca sent Corso an email detailing the number of discrimination complaints filed against unions since 2000 at the EEOC. Foca testified he had a lot of Burmese immigrants on his workforce. By email dated December 3, Foca sent an attachment concerning unions to a Burmese chairman of a church attended by a lot of Foca's employees.

<sup>15</sup> Clark testified Hernandez was Clark's lead committee person in helping Clark gather and disseminate information to the other employees. Clark identified sign-in sheets dated October 16 and October 23, for committee meetings containing 14 and 11 employee signatures, respectively, including that of Hernandez and Vargas for each meeting.

<sup>16</sup> Corso testified he notified managers, including Foca, that Corso received the October 13 union recognition request.

summary of the major initiatives we are working on along with the next steps/timing.” Corso created the attachment. Included in the attachment was the following:<sup>19</sup>

- 3rd party status
  - received a letter from Teamsters 639 October 15 to voluntary recognize the union
  - responded through attorneys on Oct 20 that there will be not voluntary recognition, they will have to petition NLRB for a hearing and an election; ball in their court
  - assumption is Union will file
  - have spoken to all the drivers about the status of things, about disappointment, about being careful of promises vs. guarantees, about dues and about the loss of individuality that a union brings
  - trained (Tuesday Nov 26) all front line managers on FOE, SPIT, business as usual, and “when in doubt call a manager”
  - high number of former union (and anti-union) workers at Coastal willing to speak out against unions.
  - Grassroots talks continue at all levels (executives, managers, other)
  - Many business actions taken:
    - now require all terminations to have partner approval
    - suspended bonus deductions for infractions
    - made vacation commitment for “2 consecutive weeks off”
  - developed clear “Helper policy”
  - reviewed 24 hour off duty police presence for December forward
  - created Logistics department
  - hired Hay Group<sup>20</sup>
  - Hired PR firm to help manage the message
  - internal and external constituents
  - continue to prepare supervisors for possible campaign
  - continue to develop potential litigation strategy
  - 2nd meeting with PR Firm (Live Wire Communication) Thursday Oct 28th.

During the October 27, meeting with the board members, Corso discussed the Union’s October 13 demand for recognition. Corso testified, “I did not feel that a union was necessary at Coastal Sunbelt Produce, . . .” Corso testified, “I felt that a union is a third--as a third party is an outsider. They have their own agendas. They have their own business objectives and that those business objectives wouldn’t necessarily coincide with

the business objectives of the goals of our people or of our customers, and so my preference was to not have the Union go to Coastal.” Corso testified he was concerned his customers would have a lot of questions if the Union came in, and there was some potential to them reacting poorly to it. Corso testified they could potentially stop doing business with Respondent. Corso testified, “What I was more concerned about was that it would take us into a territory potentially be very different than how we’re doing business today and that was uncertainty that frankly the company and the people worked there didn’t need.”

The Union filed a petition for election on October 27, in Case 5–RC–16605 for a unit of all regular full-time drivers estimating there were 200 employees in the unit.<sup>21</sup> Corso testified on that on October 27, he again met with the drivers and told them a petition has been filed which means there would be an election. Corso testified there was a management meeting after the petition was filed to let managers and supervisors know what they could and could not do. Corso testified Moore, Foca, Flanagan and Corso attended the meeting. During the meeting, they discussed the petition and their next steps. Corso testified when he received the petition he also had another meeting with management which was a little more formal. Corso testified essentially his executive team from both ECFC and CSPC attended the meeting. Corso testified Foca and Zelenik would have been there from ECFC and four or five people from CSPC would have attended.

Union Organizer Clark held a union meeting on October 30 in a restaurant in Jessup, Maryland, around 3 miles from Respondent’s facility. Clark testified around 35 to 40 of Respondent’s employees attended. Clark testified the majority of his organizing committee was there, including Hernandez. Clark testified he had given instructions to committee members including Hernandez to get out the word for the meeting. Clark testified that, during the October 30 meeting, he instructed employees not to talk to each other during work about the union.

On October 30, Stalio Callas, general manager-operations, sent Corso an email stating:

Volker walked up on about 10 drivers huddled together and heard them talking negatively about the union. He said the meeting seemed to be led by Quinn who was basically talking very negatively, angrily, and cussing about the union potentially coming in here. Danny Jiminez walked up and another driver, (Volker did not know his name) started yelling at him saying it was his fault the union is here and now your tip toeing on both sides.

Hernandez testified driver Edenixon Quinteros is known as Nixon at Respondent. Hernandez testified that on November 2, Hernandez, along with driver Javier Vargas, attended a meeting in Corso’s office.<sup>22</sup> Hernandez credibly testified as follows: At

<sup>19</sup> Only a redacted version of the attachment was submitted into evidence.

<sup>20</sup> Corso testified he told employees the company had contracted with the Hay Group to look at their pay. Corso told employees any pay increases or incentives would not materialize until after the union campaign was over. Corso testified he communicated to the drivers that since he had received the Union’s letter, he could no longer proceed with the Hay Group and he could no longer make any further adjustments because they could be construed as Corso trying to garner the drivers favor. Corso testified he told the drivers if the Union were to get in, then everything would change. They would presumably begin some kind of a negotiation. It was not like there would be a contract the next day and that any adjustments they had contemplated before the union drive could no long proceed because the rules would change. Corso testified he told the drivers Corso would not be able to unilaterally move on things the way he would have before the Union was involved.

<sup>21</sup> Corso testified that after the election petition was filed Respondent began using off-duty police at its facility with 24-hour coverage. Corso testified all of the security and police are contracted through the HR department and Corso authorized it. Foca testified the company increased the police presence during the union election period. Foca testified he participated in the decision to have it done.

<sup>22</sup> The meeting came about because Hernandez asked to speak with Corso. Hernandez testified, “because Nixon Quinteros was going around insulting me and saying bad things about me and my wife, and he was uttering profanities. He called my wife a bitch. He said that I was a son-of-a-bitch. And I just wanted to clear all these things that

the outset of the meeting Hernandez, Vargas and Corso were present. When Hernandez started talking about the Union, Corso stated he did not feel comfortable speaking about that alone, so Corso called Foca into the meeting. Hernandez told Corso the reason he came to see Corso was a driver called Hernandez and told Hernandez that Nixon was saying bad things about Hernandez' wife, Hernandez, and Vargas. Hernandez stated he was told Nixon said this mother fucking Louis and Javier, and that bitch Mayra they are trying to bring the Union here. Hernandez and Vargas said to Corso they did not have to bring the Union there because they were making good money, they had a good position, and they knew Corso would not like the idea.<sup>23</sup> Hernandez said he did not like Nixon talking about Hernandez' wife like that. Hernandez said if Hernandez heard Nixon say these things directly; he would fight Nixon there or anywhere. Corso said do not do it because you can lose your job. Hernandez said he did not care, because Nixon insulted Hernandez' wife. Corso told Hernandez that he understood why Hernandez was angry, as Nixon was not supposed to talk to you like that. Hernandez asked Corso to talk to him. Corso said no that Hernandez had to go to human resources and make a claim. Hernandez testified he never mentioned Sagastume's name during the conversation because he thought Corso knew they were talking about her as his wife. Hernandez testified Foca was present when Hernandez he told Corso that Hernandez was not involved in the Union.<sup>24</sup>

Hernandez testified Corso took him to human resources on November 2 where Hernandez met with Erin Morgan and Walter Vasquez, Hernandez' supervisor, who Corso called to provide translation. Human resources is on the same floor as Corso's office. Hernandez credibly testified that: Hernandez asked Vasquez why there was so much of a problem with the business of the Union. Morgan asked Hernandez why he was there. Hernandez said yesterday driver Hugo Arias called Hernandez because Nixon was talking about Hernandez' wife, Vargas, and Hernandez, saying really bad things that and they were trying to bring the Union there. Hernandez said it is not true. Hernandez said if Nixon had proof Hernandez was trying to bring the Union there, he could show it to Corso. Morgan said she did not know why Nixon would talk about your wife like that. Vasquez said Nixon should not be bad mouthing your wife, even if it were true.<sup>25</sup> During the meeting, Morgan asked

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were being said about us." Hernandez testified his friend Vargas was involved with Hernandez in organizing the Union, and Vargas was also being insulted by Nixon.

<sup>23</sup> Hernandez testified he and Vargas thought if Corso knew they were involved with the Union, he would take vindictive measures against them. Hernandez testified that is the reason they told him they were not involved.

<sup>24</sup> Vargas essentially corroborated Hernandez' testimony as to the November 2 meeting. Vargas testified that, during the meeting, he and Hernandez denied participation in the Union due to fear of retaliation. Vargas testified it was his belief that Nixon made it known to management that Sagastume, Hernandez, and Vargas brought the Union in and that Nixon was using obscene words against them. Vargas testified there were a lot of people in the company telling Vargas and Hernandez that Nixon let management know that Hernandez and Sagastume were behind the Union. Vargas did not hear Nixon making these comments directly.

<sup>25</sup> At that time, Arias came up to give a statement because Hernandez told him about the meeting. Morgan left the room and while she was out Hernandez told Vasquez that Nixon was talking about Hernandez' wife saying all these things, and that to speak about the Union was

Hernandez if he could work with Nixon. Hernandez said if they want to great, but if Nixon did say something, Hernandez would want to fight him. Morgan said if you fight with him you lose your job. Hernandez said he did not care that if Nixon said something about his wife that did not leave Hernandez any choice. Hernandez was told to go back to his job, and if Hernandez had any issues come to Morgan, Vasquez, or Corso. Hernandez agreed. Vasquez stated he would talk to Nixon and he would not bother Hernandez anymore. Hernandez left. Hernandez testified he provided a statement to Morgan on November 2, but Morgan did not show him the statement. Hernandez credibly testified he told Morgan that Nixon was saying they were members of the Union. Hernandez told Morgan that Nixon said that son of a bitch Luis, that son of a bitch Javier, and that bitch Mayra were trying to bring the Union to Respondent. Hernandez did not hear the remarks directly from Nixon.

Vargas testified Corso accompanied them to human resources to present a report. While at human resources, Vargas spoke with Morgan, and Vasquez translated. Vargas testified he and Hernandez spoke with them separately. Vargas testified Nixon was disrespecting them using obscene words. When Nixon referred to Sagastume, he spoke of her as if she were a street person. Vargas testified they took down the report at human resources, but said they would not do anything until they heard Nixon's side. At the meeting, Vargas spoke about Nixon accusing Vargas of being one of the union organizers. Vargas said if he had any proof, he should show it to Vargas. Vargas asked them to do something about it. Morgan told Vargas she was going to follow up with Nixon because of the bad language he allegedly used against Vargas and Hernandez, and because Nixon was saying Vargas and Hernandez were union organizers. Vargas testified Morgan subsequently told Vargas she had spoken to Nixon, but she did not tell Vargas the results of Nixon's interview.<sup>26</sup>

Sagastume testified that in November 2010, she had a conversation with Corso about Nixon. Present were Corso, Morgan, someone named Joey, and Milagros, who worked for human resources. Sagastume testified that she asked for the meeting because she found out Nixon was saying bad things about her and referring to her in vulgar terms. Sagastume asked Corso to talk to Nixon to ask him to stop talking about her and sticking her in the drivers' problems. Sagastume testified Nixon was "going around saying that old whore, who is his wife, that she was taking information to the people in the tomato lines so that they would go into the Union. Because Luis was the union organizer —." Sagastume told Corso to tell Nixon to stop talking about her, and to stop insulting her. Corso said he understood and he would speak to Nixon. Sagastume testified she did not tell Corso her husband supported the Union. Rather, she told him Nixon was saying her husband supported the Union.

Corso testified on November 2, Hernandez and Vargas came to him about a problem with Nixon. He testified Sagastume

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a subject that was very delicate and serious. Hernandez told Vasquez if the company ever found out that he was doing that they would terminate him, but they would not fire Hernandez directly, they would look for an excuse to fire him, or pressure him into resigning.

<sup>26</sup> I have credited Hernandez' and Vargas' testimony as to the contents of their meetings on November 2, first with Corso and Foca, and then with Morgan and Vasquez. They testified in a credible fashion as to the meetings, and their testimony is corroborated or undisputed on the record. Morgan and Vasquez did not testify.

also came to Corso about a complaint about Nixon. Corso could not recall whether Sagastume's meeting was before or after Hernandez' meeting. Corso testified he did not remember what the next steps concerning their complaints were. Corso testified he thought HR would take care of it. Corso testified Nixon also made complaints. Corso's testimony appeared to be purposely vague concerning this incident. For example, the following exchange occurred:

JUDGE FINE: Were you aware Mr. Nixon was making complaints, sir?

THE WITNESS: Mr. Nixon, we—did Mr. Nixon come talk to me or did I tell him to talk to HR, I don't remember. I don't know what went on. But I will tell you is that I know whatever Mr. Nixon had involved, I directed it to HR. I didn't get engaged with it.

JUDGE FINE: Well, do you know what the subject of his complaints were?

THE WITNESS: I think it had something to do with Luis and Javier, because they were the ones in my office on November 2nd. But I'm not sure.

JUDGE FINE: Well, did you talk to HR? Did Mr. Nixon come to your office at all?

THE WITNESS: He didn't come to my office, Your Honor.

JUDGE FINE: Did you discuss it with him at all?

THE WITNESS: Did I discuss this with him? I don't remember whether I pulled him up or somebody else pulled him up to make this statement, Your Honor. I don't think I was involved. I wouldn't have been involved in this.<sup>27</sup>

JUDGE FINE: All right. Did you ever receive a report of what Mr. Nixon's complaints were?

THE WITNESS: No, I didn't Your Honor.

JUDGE FINE: And you have never seen this before?

THE WITNESS: Never seen this document before.

....

JUDGE FINE: You never spoke to Ms. Morgan about what she learned.

<sup>27</sup> Corso later testified concerning his contacting Nixon that Nixon did not tell him a whole lot and that he could not recall whether he had a conversation with Nixon. Corso testified it was important that Nixon gave his side of the story. Concerning referring Nixon to HR, Corso testified, "I don't know if I asked him to go up or referred him to go up, or he came to see me, I don't remember." Corso testified, "All I know is that he ultimately ended up in human resources and that was enough for my purposes." Corso testified that he could have had a conversation with Nixon, but it would have been very brief, and it was not about the Union. I found Corso's lack of recall as to his contacts with Nixon concerning Hernandez, Vargas, and Sagastume to lack credibility. Corso spent considerable expense and time in his efforts to combat the Union's organizing of his employees. Morgan's notes of November 2 reveal that Nixon told her that Vargas attempted to persuade Nixon to sign a union card leading to something close to an eventual confrontation between the two. I have concluded that given the nature of Hernandez, Sagastume, and Vargas complaint to Corso, as well as Respondent's strong stance against the Union, that whether or not Corso spoke directly to Nixon about it was something that Corso would not likely forget. Given the ambiguous nature of Corso's testimony concerning his contact with Nixon, I have concluded that he either spoke to Nixon directly, that Corso received a report from human resources about what Nixon had to say, or both.

THE WITNESS: I don't remember at this point, Your Honor. I don't know. Let's see if she has something, so I'll say I don't know. I don't remember.<sup>28</sup>

The document Corso denied seeing is typewritten notes, dated November 2, made by Morgan during her interview with Nixon. In the notes, Morgan included a "Statement provided by Nixon." Morgan reported that Nixon stated Javier Vargas gave Nixon a card and asked Nixon to meet Vargas at McDonalds. Nixon responded he would think about it and Vargas said no sign it now. Nixon said he had a right to think about it. Nixon said he saw Vargas by the hand trucks with some other men who were talking about the Union. It was stated Vargas later approached Nixon in the parking lot and said he had come to talk to Nixon. Nixon just drove off. He stated Vargas followed him in his car to a light. Nixon stated Vargas got out of his car with a knife in his hand, but Nixon again drove off. Nixon stated he told this to Justin Callas, Erika Perez, and Steven Griffin this morning. Nixon then discussed some other employees' opinions about having a union. Nixon stated he could continue to work with Hernandez and Vargas peacefully while the investigation was being conducted.

On redirect exam, when questioned by his own attorney, Corso's memory as to the events of November 2 greatly improved. Corso testified in detail about his November 2 meeting with Hernandez and Vargas. Corso even had specific recall of where Hernandez, Vargas, and Foca sat in the room. Corso testified that Hernandez did the talking. Hernandez said an individual had been targeting his wife and saying bad things about Hernandez because he was suggesting that Hernandez was part of the Union. Corso responded that before they talk about anything union related he wanted to get someone. Corso left the office and returned with Foca. Corso asked Hernandez to start back up from what he was saying. Hernandez said Nixon is saying bad things about my wife and calling her all kinds of nasty names just because Nixon says Hernandez supports the Union. Corso asked if Nixon said that directly to Hernandez and Hernandez said no. Corso testified that Hernandez started to use some very vulgar language and became extremely animated about what he would have done if he had heard it directly. Corso told Hernandez to calm down and that he could understand Hernandez being upset. Hernandez told Corso that did not support the Union and he was not affiliated with the Union. Hernandez said he loved working there and he was one of the highest paid drivers and that it was great. Vargas said to Corso he had been at L & M a long time, that at Coastal, he made good money and was very happy. Corso testified they voluntarily stated to Corso with Foca in the room that they had nothing to do with the Union. Corso said that was fine that he trusted them. Corso directed them to human resources, stating that they need to make statements and that they will take care of it from there. Corso testified when Hernandez referred to his wife, Corso assumed it was Sagastume. Corso testified this was the first time he had ever heard the word union, nonunion, with regards to Vargas or Hernandez. Concerning Nixon, as to whether he followed up on whether Nixon made the alleged remarks, Corso again testified he could not recall.

Foca testified concerning his attendance with Corso at the

<sup>28</sup> In fact, as set forth later on in this decision, shortly before Sagastume was terminated, Corso did request the results of Morgan's investigation of the events of November 2.

November 2 meeting with Hernandez and Vargas. Foca testified there were two points in the conversation. One was Hernandez was upset about an incident that happened to his wife, Mayra, with another driver. Hernandez said he also wanted to make sure that Corso and Foca understood that a lot of people were pointing the finger at Hernandez, but that Hernandez was not the organizer of the Union. Hernandez stated he did not support the Union and explained the reasons why. Foca testified he did not know Hernandez before November 2 because Foca did not have direct contact with the drivers. Foca testified Hernandez was telling a very believable story. Foca testified as follows:

Q. Why was it so believable?

A. If I have nothing to do with the Union, and people were accusing me, I think I would sit down with the people and say, hey, guys, you need to understand. I think I would do the same thing if I was in his shoes.

JUDGE FINE: Why it that?

THE WITNESS: If I was a person that didn't support the Union, and I thought there may have been some rumors, I think I would go to people and say, hey, just so you know, I'm not part of this.

JUDGE FINE: Why? Why would you feel that it'd be necessary one way or the other?

THE WITNESS: I think he wanted us to understand his point of view and know that, hey, I'm not part of this. I really didn't analyze it a whole lot.

While Foca claimed he did not know Hernandez prior to November 2, Foca testified he knew at the time that Hernandez was married to Sagastume. Foca testified he did not know if Hernandez mentioned his wife's name during the November 2 meeting, "but I knew who he was talking about, absolutely." Foca claimed he had already decided to eliminate Sagastume's position as of the November 2 meeting.

Corso hired an outside union consultant called Russ Brown Associates (RBA) to help with Respondent's campaign against the Union. Brown sent Corso a proposal for their work on November 4, with the heading, "Re: Union Prevention Proposal", which was underlined and in bold ink. In the letter, Brown stated, "we hope to provide some of the multitude of reasons why we are best suited to assist you in defeating the Teamsters. . . ." Brown stated, "We will garner a win; provided we are given sufficient time to produce results." This statement was also underlined for emphasis. The plan laid out by Brown in the proposal letter was for RBA to hold weekly group employee meetings with all voters, the content of which was discussed in Brown's letter. The plan also included one on one meetings with each voter. Brown stated they would also work with Corso under the heading "Supervisory Training" in guiding your supervisors in the correct and legal procedures and tactics. It states, "We will share 20 years experience 'in the trenches' on how to campaign most effectively with employees." The letter included a 5 week plan concerning Respondent's actions during the election campaign. Week 2, 3, and 4 included "one on one campaigning", which was in bold and underlined print. Brown signed RBA's proposed contract with Respondent on November 5. It was stipulated that CSPC agreed to pay RBA between \$125 and 225 per hour for their services. Corso notified Foca that he entered into this agreement with RBA. Corso identified an email chain which he sent to Respondent's board of directors in Atlanta on November 5

concerning the decision to use RBA. He stated in the email, "They are due to kick off on Tuesday." Corso received a response from a board member on November 5, to which Corso replied, "We feel good about the references and the decision to move forward." Corso forwarded a copy of the email chain concerning the hiring of RBA to Foca on November 6 at 2:46 a.m. Corso testified Brown came to the facility and met with some of the managers, including Foca. Corso testified Respondent started working with RBA shortly after Corso's receipt of Brown's November 4 proposal. Corso estimated they started working on November 5 or 6.

Corso testified his staff received training from RBA "to make sure that we were not allowed to threaten anybody, make any promises, or interrogate or spy on people. And we were trained to basically speak about only the facts, opinion, or experience." Corso testified his executive team, managers, and supervisors received training. The RBA document used in the supervisory training states, "In the event of a Union organization drive, don't think you can hang back and remain neutral."

Hernandez testified he attended meetings held by management concerning the Union. He testified the meetings began around the end of October. Attendance was mandatory. Hernandez testified he was paid to attend the meetings in the amount of \$25 a meeting. Hernandez testified CSPC had three shifts for its drivers. Hernandez testified 95 percent of the work force was Hispanic. Corso presided over the meetings, with Walter Vasquez serving as the interpreter for the Spanish-speaking employees. Hernandez testified once the process began a man named Luis and a woman named Olga also spoke at the meetings.<sup>29</sup>

Vargas testified he attended meetings at Respondent held by management concerning the Union. Vargas testified he attended one per week. Vargas testified the meetings started after Corso received a letter from the Union. Attendance was mandatory, and employees had to sign in at the meetings. Vargas

<sup>29</sup> Hernandez testified the employees were paid for the company meetings where Luis and Olga were in attendance. Luis and Olga were apparently working for RBA. While Hernandez initially testified he had received approximately \$300 for attending these meetings, he later testified it could be only have been \$150. He could not state whether he attended 6 meetings or 12 meetings. Hernandez thought the paid company meetings took place in November and December. Hernandez' payroll records from September 1 to December 30 show Hernandez was paid a \$25 bonus on each of November 18, December 2, December 7, and December 15. Corso testified the \$25 bonus was paid to drivers for attending Respondent's meetings concerning the union campaign. Corso testified the meetings were held with RBA or Corso speaking. Corso testified that in the fall of 2010 prior to the Union campaign, they had some focus groups and they paid drivers some money for attendance. Corso testified they were longer meetings and he thought they paid \$50 for those. Hernandez' payroll records during this period showed he received one \$50 bonus on September 14. Hernandez estimated he attended more than four meetings conducted by Respondent concerning the Union. Hernandez records show he was only paid \$25 for each of four meetings. However, Corso received the letter requesting recognition from the Union on October 15, and he testified he conducted meetings with the drivers concerning that letter. Hernandez and Vargas attended such a meeting. Corso testified he also held a meeting with the drivers when the representation petition was filed by the Union on October 27. Apparently, the drivers were not paid for attending either of those meetings. Hernandez payroll records bare out his testimony that he only started being paid to attend Respondent's meetings concerning the Union after Respondent contracted for the services of labor consultants RBA.



testified he was paid \$25 per meeting to attend the meetings. Vargas testified the company meetings occurred throughout the day as the drivers had different schedules. Corso and his assistants presided over the meetings. Vasquez translated at some of the meetings. In one of the meetings, McWhorter was present. Vargas testified he attended a meeting in the small meeting room where a strike was mentioned. There were 20 to 30 people there, with Corso presiding. Luis, a contractor Corso hired to talk about the Union, translated for Corso. Vargas credibly testified Corso said if the Union won the first thing they would do is to ask the employees to hold a strike because Corso would not accept their conditions, nor would he sit down and negotiate with them. Corso also said if there were a strike, any one of the drivers could be terminated permanently and replaced by another driver. He said strikes could last months or years, and he was not about to let that stop his company, and for that reason, the employees could all be permanently replaced. Vargas testified Corso said he was against the Union. Corso said he preferred to shut down his company than to have the Union come and tell him what to do.<sup>30</sup>

Corso testified he gave speeches to employees during the election process in support of their voting against the Union. Corso testified he was disappointed the drivers wanted a union and he shared his disappointment with employees.<sup>31</sup> Corso identified a document provided by RBA which Corso used for talking points during some of the employee the meetings.<sup>32</sup> He testified he did not read from the document, and his recollection of what he specifically said at the meetings was vague. Corso testified he may have told employees as far as he was concerned a union was not an option for Coastal. Corso testified he would have said that should a union happen at the company, we obviously have to do whatever is necessary to protect our organization, to protect the many families who are here, and to protect our customers. Corso testified, "I don't remember what else I said but that's kind of the flavor of it." Corso testified during the week he used the document for his speeches there were groups of 30 in attendance, and he estimated he used the document for six or seven meetings. Corso testified, "I was saying that we have—Coastal Sunbelt Produce has attorneys, yes, something like—some version of that, yes, I don't remember what I said." The import was to make sure that we conducted a free and fair election. Corso testified he told everyone

<sup>30</sup> I have credited Vargas' testimony as to what Corso stated during the described meeting. At the time of his testimony, Vargas was a long-term employee testifying against the interest of his employer. In fact, Corso was in the room when Vargas testified. Vargas testified in a direct and credible fashion. Corso did not directly deny Vargas' description of the meeting. Rather, as set forth below, Corso professed poor recall of what he specifically said. He at times he described his discourse in terms of what he would have said as opposed to his actual statements made.

<sup>31</sup> Corso testified employees of CSPC volunteered to speak out against the Union. Corso testified a number of employees approached him saying, "I don't want the Union here, ..." Corso testified he responded, "this is what you have to do. Now is the time to speak up and be passionate about it. If this is something you don't believe in, then you have to let your voice be heard. That's part of a fair and open election process and you should speak up. So a number of employees spoke to me."

<sup>32</sup> Corso could not recall the date of the meetings in which he used the RBA document, stating it was after November 6. Corso testified they had several weeks of meetings because the drivers were a large pool working different hours.

prior to receiving notification from the Union that he had heard much feedback about their pay system through the focus groups, so Corso engaged the Hay Group, a consultant because it was important to make sure they paid people competitively and once the Union started they had to put that on hold.

Hernandez credibly testified to a conversation he had with CSPC Fleet Manager Joey Saia, an admitted supervisor at Respondent. Hernandez has known Saia for around 14 to 15 years. Hernandez testified as follows: Saia called Hernandez the Sunday after Hernandez' November 2 conversation with Corso, which was November 7 at around 3 p.m. Saia told Hernandez he wanted to talk to him and it was personal.<sup>33</sup> Hernandez met with Saia at around 5 p.m. that day at Saia's house. Saia said to Hernandez that he wanted to know what was going on with the Union. Hernandez said he really did not know what was going on. Hernandez said there were a lot of people involved with this problem. Saia said he heard Hernandez was the head of the Union. Hernandez responded they lied to Saia. Hernandez asked Saia who asked him to talk to Hernandez, and if it was it Corso. Saia said no, there was a conversation, and Saia offered to talk to Hernandez because Saia was Hernandez' friend.<sup>34</sup> Hernandez told Saia that he knew Saia was his friend. Saia said he wanted to know who the person is in charge of the Union. Hernandez responded there are too many people on board, it was not just Hernandez, not just Vargas, there were 20 to 25 people. Saia told Hernandez to talk to Corso that Corso is a nice man. Hernandez said he did not trust Corso. Hernandez said Corso may be a good person, but when he comes downstairs and talks to the supervisor, all the problems stay downstairs after he leaves. Hernandez told Saia of problems at work and how the supervisors could get Hernandez fired, and of problems he was having with Caplinger. Saia told Hernandez to talk to Corso, explain everything to him, "maybe they can give (you) a different position because you know all the routes." Hernandez said he was sorry, "but I don't trust John." Hernandez said he was going to talk to McWhorter because he had worked with him before, and when Hernandez had an issue he went to him and he fixed it right away. Saia said to Hernandez, please talk to the people and try to stop the Union because it is not good for the company. Hernandez said it was not good for the company, but Hernandez needed respect, and that is the point. Hernandez stated he did not have too many issues with the company because he was making really good money. Hernandez said he did not know if he came to work one day whether Caplinger would decide to fire him. Hernandez said he wanted to protect his job. Saia said please talk to the guys and try and stop the Union. Hernandez said, "well, Joey, let me try to talk to them, . . ."

Vargas credibly testified Saia spoke to drivers in the drivers department concerning the Union. Vargas testified since Saia is a good friend of all the drivers, he thought he could obtain information from them. Vargas testified Saia asked Vargas if

<sup>33</sup> Hernandez testified Saia frequently called Hernandez about work or some other reason.

<sup>34</sup> Hernandez went on to testify that he thought Saia had the conversation at work with Corso. Hernandez testified Saia did not say it was with Corso, but rather with all the personnel at Coastal. Hernandez then testified Saia said he had the conversation with Corso, and some other unnamed people. Hernandez testimony here was somewhat convoluted and I do not find Hernandez was told directly by Saia that Corso asked him to talk to Hernandez.

he knew who was doing the union organizing on more than one occasion. Vargas testified that, about 2 or 3 weeks before Sagastume was terminated, Vargas told Saia that Vargas was in favor of the Union. Vargas testified Saia knew Vargas and Hernandez were good friends and where Vargas went Hernandez was going to be concerning the Union.<sup>35</sup>

In crediting Hernandez and Vargas concerning their conversations with Saia, except as specifically discussed to the contrary in footnotes, I have taken into consideration that Hernandez omitted the conversation from his pre-hearing affidavit, and he also stated in the affidavit that the company did not know about his union activities.<sup>36</sup> However, Hernandez testified with good recall concerning the conversation Saia, and it did not appear through my observation that he was inventing the event. I have also considered Vargas status as a current employee when he testified and his testimony served to corroborate Hernandez to the extent that Saia was engaging in the practice of questioning employees concerning their union activities. Finally, Saia was not called to testify creating an inference that he would not have challenged the accuracy of Hernandez and Vargas' descriptions of their encounters with him.

Vargas testified McWhorter was one of the owners of L & M Produce. Vargas testified McWhorter owns shares of Respondent and Vargas thought McWhorter managed Respondent's sales personnel. Vargas testified he and McWhorter spoke about the Union a few of days prior to Sagastume's termination. Vargas testified McWhorter was calling drivers into his office. He testified McWhorter called him into the office at noon, and he asked Vargas what he thought about the Union. Vargas told McWhorter it was the only way to fix things with the company because they were not respected and they did not have any guarantees. McWhorter said that was crazy because the Union was not a good thing, it charged for its services, and the Union could only make promises. McWhorter said the Union brought a lot of problems to the people. Vargas asked if the Union is so bad, why they did not let the Union explain what benefits it can bring to the employees. Vargas testified McWhorter knew Hernandez was Vargas' friend and therefore it was likely Hernandez supported the Union.<sup>37</sup>

<sup>35</sup> Vargas testified he did not hear Saia directly question Hernandez. However, Vargas later testified he heard Hernandez tell Saia that Hernandez supported the Union. Vargas testified that was around one to 2 weeks before Sagastume was terminated. I do not credit Vargas as to this aspect of his testimony as it only came belatedly, and it was not confirmed by Hernandez.

<sup>36</sup> Hernandez testified he believed Saia was his friend. However, Hernandez testified he thought, at the time of the trial, that his conversation with Saia was the reason Respondent terminated Sagastume. In this regard, Hernandez testified that when he informed Saia of Sagastume's termination that Saia did not seem surprised.

<sup>37</sup> Vargas testified credibly about this conversation. McWhorter was not called as a witness and therefore Vargas' testimony was uncontroverted. Moreover, the content of McWhorter's remarks as Vargas described them parroted some of Respondent's campaign themes such as the Union would take money from employees pay and could make no promises. Finally, Respondent's campaign strategy as set forth by RBA called for one on one meetings with employees and for supervisors to actively participate in the campaign to enhance Respondent's cause. Hernandez and Vargas also credibly testified that following Sagastume's discharge, at the end of November, McWhorter called Hernandez and Vargas into his office as McWhorter as he was doing with all of the former L & M drivers. During the conversation McWhorter questioned them about what they thought about the Union. Hernandez told McWhorter he was with the Union. Vargas testimony

### *C. Sagastume's November 18 discharge*

Sagastume began working for L & M Produce in 1997.<sup>38</sup> She obtained the job through her husband Hernandez, who was already working there and who spoke to McWhorter on Sagastume's behalf.<sup>39</sup> Sagastume testified the company name changed around 2 or 3 years ago when L & M was purchased by Respondent. Sagastume testified that, at the time L & M was sold to Respondent, Sagastume worked in what she referred to as the broken room. The broken room is also referred to as repack by the parties. Repack is part of the tomato department where Sagastume worked at the time of her termination at Respondent.<sup>40</sup> Sagastume testified repack is where they prepare all types of fruit and vegetable products in small units or quantities which are mostly orders for restaurants.

Sagastume worked Monday through Friday with a 6 or 6:30 a.m. starting time. Sagastume's departure time depended on the daily workload. She testified busy periods included holidays such as Thanksgiving and Christmas. At the time of her termination at Respondent, Sagastume's job title was administrator. Sagastume held that job title for 2–1/2 to 3 years. Sagastume described her day at Respondent as early in the morning she issued reports on the produce for repack to find out the quantity of work that had to be done that day.<sup>41</sup> Sagastume obtained the report from the computer, and according to its requirements she then ordered the products for the workers that day. Products included items such as chilies, yellow chilies, cilantro, Italian parsley, and potatoes. Sagastume had employees bring the listed products to the work area in the morning to ensure that at 7 a.m., when the first repack workers arrived they could begin work. Sagastume prepared inventories making sure all the produce received in the repack was entered into the computer. Sagastume would also go to the warehouse to check the actual product inventories, and she would go back and correct any mistaken amounts in the computer. Sagastume kept information concerning slats of produce being placed on pallets

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served to corroborate Hernandez description of the meeting stating that McWhorter asked them what they thought of the Union, and they said they were in favor of it. Vargas confirmed that McWhorter tried to talk them out of their support.

<sup>38</sup> Sagastume testified around 17 to 18 years ago she worked for Respondent for around a year and one half at a different location. She testified where she worked then is now referred to as ECFC at Respondent. At that time, Sagastume worked processing vegetables and packing them for restaurants. Sagastume testified she had about 9 years experience performing the work now performed by ECFC. Sagastume testified ECFC has certain sanitary standards they maintain while cutting up product, which are more stringent than the standards required for the tomato line, and that because of that production employees are not transferred between the tomato department and ECFC. Sagastume testified she also had experience working in ECFC's type of operation because she worked for L & M from 1997 to 2003.

<sup>39</sup> Sagastume testified she sometimes referred to Hernandez as Fernando. Sagastume testified McWhorter, Ramos, and Saia knew that she and Hernandez were married. Hernandez also has a nickname at work called "Fish" for "Fishy." Respondent's counsel stated at the hearing Respondent was not contending Hernandez and Sagastume were not married.

<sup>40</sup> There is a department at Respondent outside the tomato department which is also called the broken department. Sagastume did not work there. For purposes of clarity in this decision, I will refer to the area where Sagastume worked in the tomato department as repack.

<sup>41</sup> A separate daily report was issued by A. Hernandez for the tomato line.

and she entered that information into the computer program. Sagastume also performed what she termed quality control in that she made sure there were sufficient materials such as caps and gloves for employees. Sagastume had to ensure there were adequate quantities available of the chemicals used on the tomato line such as chlorine. Sagastume made sure there was a person there who could do the cleaning. Sagastume had to fill out the appropriate cleaning report and initial it every day. Sagastume filled out all the forms, checked the chlorine level on the tomato line, and she made sure employees had everything they needed to work. Sagastume also placed labels on the pallets to make sure they went to the right place in the warehouse. She testified there were around 30 different products. Each had a particular size box. Sagastume's main job was in repack where she was in charge of inspecting. When they finished packing a pallet, she inspected it for quality before they started another one. Sagastume inputted information in the computer just for repack. There were 11 to 12 people working in repack who did the packing. The work done on the computer was only done by Sagastume. If Sagastume had the time, she went to work with the woman at the repack table.<sup>42</sup>

Julio Ramos was Sagastume's supervisor at Respondent. He had been her supervisor for 2 or 3 years. She communicated with Ramos in Spanish. Ramos supervised around 40 people in the tomato department, which included repack where Sagastume principally worked.<sup>43</sup> There was one shift at the tomato department. Sagastume testified Perdomo started working with them in the computer room in the tomato department. Sagastume understood Perdomo was being trained to be another supervisor. Perdomo started in the tomato department about 4 to 6 months before Sagastume was terminated. Sagastume testified when she was terminated Perdomo was out from work with medical problems. Sagastume testified Alex Hernandez (A. Hernandez) was an assistant to Ramos. In Ramos' absence, Hernandez took charge of the tomato line. A. Hernandez also knew the repack work very well.

Sagastume's computer was in a covered office. The area included a table, two chairs, and two computers. Sagastume testified the office was noisy because the trucks go by there, the forklifts make noise, and because of the tomato line itself. There are machines at the tomato line including pallet bearers and forklifts. Sagastume testified the tomato line consists of a broad moving belt where a lot of people check to see that no rotten tomatoes get through, and they also separate the green, yellow, and red tomatoes. They put the tomatoes in boxes. Sagastume testified that during September, October, and November 2010, she was working more than 40 hours a week, stating sometimes 46, 49, 50 hours from Monday through Friday. During that time, she spent most of her time in the repack

and she very rarely worked on the tomato line. Sagastume testified when she did work on the tomato line, that neither she, Ramos, A. Hernandez, nor Perdomo worked there physically. Sagastume testified the type of work she performed on the tomato line was she would rotate personnel from the tomato line and to the repack line, would make sure people were doing their job, or ensure they had all the materials they needed to do the job. Sagastume testified the few times she worked on the tomato line it was on Ramos' orders, and what she did was check quality on the tomatoes by watching the tomatoes on the line. She did not pick the tomatoes off the belt and inspect them. Sagastume testified she never did packing of the tomatoes.

Sagastume testified when it was very busy she was spending about 35 hours a week typing information into the computer. The program was in English. While Sagastume does not read or write in English, she was trained to use Respondent's Excel program by Ramos and A. Hernandez. More specifically, Sagastume typed three different types of information into the program. This included the morning report which contained what had to be worked on in the repack department. There was another page called the yellow page, where Sagastume typed in the date, the code of the product, the quantity of boxes that had been used, and the number of people that had worked on it, the amount of time they had used, and the price of the box that was used for each product. The yellow page would issue a price for the box. According to the price, Sagastume went to another page to enter that information into the system. Sagastume testified she also typed the inventory into the computer. The inventory is on a page in the Excel program which Sagastume printed and then went to the warehouse to verify the actual amount of product was correct on the inventory sheet. Once she checked the inventory at the warehouse, Sagastume corrected the amount in the computer program. The only other thing Sagastume did with the computer was to print labels and put them on the pallets. Sagastume testified working on the computer and gathering information for it took most of her day.

Sagastume testified she also worked in the repack department, mainly in the morning. She testified it was around 15 hours a week that she worked there mainly from 8 to 9 a.m. Sagastume would check to see which area of the repack department needed help. Then she helped them by doing everything they did, for instance packing the produce, or making boxes for packing the produce. She testified there were about 10 to 12 workers in the repack department. Sagastume testified she could perform the packing as fast or faster than the employees who worked in repack. Sagastume testified she had responsibilities with chlorine which was only used on the tomato line. Sagastume had to check the chlorine level 3 times a day, and make sure the machine was working correctly.

Sagastume testified she attended an anti union meeting at the job. Sagastume testified Corso spoke and there were two people there who Respondent hired as part of its campaign against the Union, one of them was Luis, another was a woman. Corso spoke in English, and Luis translated for him. Sagastume testified all of the employees from the tomato department attended the meeting. The meeting was around 11 or 11:30 a.m. Ramos sent the employees to the meeting. Ramos said his bosses from upstairs sent him an email that the employees were to attend. Sagastume testified Corso said he held the meeting because he found out the drivers department wanted to form a union. Corso said he had heard those rumors and he was very worried.

<sup>42</sup> Sagastume testified tomatoes were not her primary responsibility. Reports from the computer for tomatoes were done by A. Hernandez and Ramos. Sagastume testified Perdomo was A. Hernandez' assistant. Perdomo practically performed the same function as A. Hernandez. Sagastume was also training Perdomo in repack. When Sagastume was terminated, Perdomo practically knew everything that had to be known in the repack department. Sagastume testified when the tomato line was very busy and needed help people from repack would help them, and vice versa.

<sup>43</sup> There are three production lines in the tomato department, that is two tomato lines and one repack line. The parties often refer to the tomato department as the tomato line, and it, on occasion, may be referred to as such in this decision.

Corso said he wanted to let them know the Union was a bad thing for the company and for the employees. Corso said when a company worked under a union the rules changed. Corso said the Union would take money out of your check every week. He said nothing is free. Corso said you would not be able to talk to him directly. Corso said, for example, if you want to ask for a raise Corso would have to do it on the basis of the Union and whether the Union decides its is possible. Sagastume testified Corso said he was totally against the Union and then they showed the employees a video. Sagastume testified everything in the video was against the Union. She testified Corso said if they found anyone in the parking lot distributing literature please ignore them and to tell Corso about it. Sagastume testified the meeting took place around 2 or 3 weeks prior to her termination.

On November 15 at 11:22 p.m., Corso sent an email to Moore, in which he stated, "Checking in. Things going well." In his email Corso asked Moore, "Did we ever follow up on complaints Nixon, Javier, Luis and Myra lodged?" Moore responded by email dated November 16 at 6:25 a.m. stating, "I will check with Erin (Morgan) on the other once she is in." As to Corso's question as to how things were going, Moore responded, "Not so good, there was some pro-union talk from the night warehouse team. I will go over the issues when you are in today." As set forth above, Morgan's notes revealed she had interviewed Nixon on November 2 and Nixon had given her a statement informing her that Javier (Vargas) had given Nixon a union card and insisted Nixon sign it at the time and Nixon refused. Morgan's notes reveal that Nixon stated Vargas had subsequently followed Nixon after work in a threatening manner. Morgan's notes reveal she asked Nixon if he could work with Vargas and Hernandez while her investigation continued and Nixon said he thought he could.<sup>44</sup>

Sagastume testified she had a conversation with Ramos on November 16 or 17.<sup>45</sup> Sagastume clarified her testimony as to the date of the conversation by stating it took place the day before she was discharged. Sagastume was terminated the morning of November 18, and I have concluded her conversation with Ramos took place on November 17. The conversation took place in an office a "little way" from where they worked. The conversation was in Spanish at around 3:30 to 4 p.m. Sagastume testified she was working at the computer as it was a

very busy day. Sagastume testified Ramos touched her shoulder and asked if Sagastume was tired and she said yes. Ramos told her to get up from the computer because he saw she was very tired and they should go out and talk. Ramos replaced Sagastume at the computer with A. Hernandez.

Sagastume credibly testified as follows as to the conversation: Ramos said he was very nervous and worried about the business of the Union. Sagastume said a lot of people were in the same frame of mind, and everyone at the company was worried because that is the only thing anybody talked about. Ramos said he just wanted this thing to be over with, whatever the outcome. Sagastume said they all felt the same. Ramos said, "What do you think of the Union?" Sagastume said they did not have anything to do with the Union as this is something to do with the drivers. Ramos said yes, but if the Union came in it was going to affect all of them. Ramos said the ones who were going to be affected the most in this department were Ramos and Sagastume because they were the ones who earned the most. Ramos said the Union would take money out of Sagastume and Ramos' checks to level the paychecks of all the others. Sagastume said, "No, that's not true." She said she had worked with a company years ago that had a union and that did not happen, and she did not think things had changed.

Sagastume credibly testified: Ramos asked Sagastume what she would do if the Union came in. Sagastume said if the Union came in she would support it. Ramos said he did not think that was going to happen. He said Corso is not going to allow that to happen. Ramos said Sagastume should talk to her friends because Corso told Ramos he prefers to shut down the company rather than allow the Union to come in. Ramos said he did not think this was a good idea. Sagastume said what can we do and Ramos said what you have to do is talk to Hernandez, and he should talk to Corso and to the other managers in the company. Hernandez should tell them that he repents for what he has done, and Hernandez should apologize because they are worried. Ramos told Sagastume if Hernandez apologizes he will continue with his job and nothing will happen. Sagastume said I do not think they are going to overlook this and pretend nothing happened. Ramos said in any case Hernandez should talk to them because so many things have changed with the drivers. For example, they did not like the supervisor, and they changed the supervisor. Maybe they might change their mind and they can continue working well. Sagastume said she did not think that was going to happen and she did not think the drivers are going to go back. She said speaking personally for Hernandez, she did not believe he was going to step back and undo what he did. Ramos said if the Union does not come in each of those drivers one by one; they are going to send them to hell. Sagastume replied that is what they thought. She said that was their problem and she had spoken to Hernandez about this and she had told him to think it over to see the good things and the bad things. Sagastume said she had spoken to him and that is what they have decided. Ramos said, "Well, look at all of this shit that's going on." Ramos stood up and walked away. The conversation was around 20 to 30 minutes.<sup>46</sup>

<sup>44</sup> Despite seeing the above email exchange, Corso maintained he did not recall if he received followup on the complaints from Nixon, Javier, and Luis from either Moore or Morgan. Corso testified, "As I said previous with all this, I don't remember what happened next." I do not credit Corso's testimony here, and have concluded he was informed of the results of Morgan's investigation by either Moore, Morgan, or both. In this regard, he initiated the inquiry, and Moore stated she was going to check with Morgan, and that she planned to discuss pro-union talk in the warehouse when she met with Corso that day. I have concluded that she did meet with Corso as intended and she did update him with Morgan's investigation results as Corso had requested. Moreover, I find that Corso recalled the results of the report, although he denied doing so at the time of his testimony. Corso's denial appeared to be part of a pattern in his testimony in denying the obvious in an effort to deny knowledge of Hernandez' union activity at the time of Sagastume's discharge.

<sup>45</sup> Sagastume initially testified the conversation was on November 16. However, Sagastume alleged in her unfair labor practice charge the conversation with Ramos took place on November 17. When this was pointed out to her at the trial, she testified the conversation took place around November 16 or 17.

<sup>46</sup> Sagastume credibly testified Ramos had previously asked her two or three times if it was true that Fernando is messing around with the Union. Ramos knew Hernandez as Fernando as Sagastume calls him Fernando. Sagastume testified at the time she told Ramos no because they were trying to find out who it was, and the employees were just

Sagastume credibly testified that: Sagastume returned to her desk and went to work. Sagastume thought it was strange because she did not see Ramos the rest of the day. At around 6 p.m., Sagastume asked A. Hernandez if he had seen Ramos and he said he did not know where Ramos was. Sagastume dialed Ramos' cell phone number two times but he did not answer. Sagastume knew Ramos was still at the facility because his car keys were still there. Sagastume went to the restroom around 6 p.m., as it was time to go home. In the area of the restrooms are the stairs to the upstairs offices, including Corso's. She testified all the offices are up the stairs. Sagastume saw Ramos coming down the stairs from the offices. Ramos said, "Oh, well, you haven't left." Sagastume replied she had phoned Ramos' phone twice and he did not answer. Sagastume said she had to go. Ramos said fine they would see each other tomorrow. Sagastume testified the stairs lead to the offices.

Sagastume testified in a credible fashion concerning her employment history, job functions, and as to the contents of her conversation with Ramos taking place the day before her termination.<sup>47</sup> On the other hand, the same cannot be said concerning the veracity of Ramos' testimony.<sup>48</sup> Ramos testified that, during the course of her employment, Ramos considered himself to be friends with Sagastume.<sup>49</sup> Ramos testified he felt Sagastume was someone he could trust and they used to talk a lot at work.

Ramos testified he heard rumors in October or November that the drivers were trying to organize a union. Ramos testified, "I didn't pay attention to them." Ramos testified, "I heard that the drivers were organizing a union, just that. I'm not part of that. I work in the warehouse." Ramos testified he used to hear the "girls" on the tomato line talking about the drivers organizing. Ramos testified, "I do my work and then home." Ramos incredibly claimed he never received any instructions from his supervisors about talking about the Union. Ramos testified he was never told by management what he could and could not say. Ramos testified, "We had nothing to do with the Union. We're in the warehouse. Why should we talk about that." Ramos testified, "We never talked about the Union." Ramos testified he never talked about the Union with Foca stating, "No, why should I talk about it? They work upstairs and I work below." Despite testifying that he used to frequently talk with Sagastume at work, Ramos incredibly claimed he never talked to Sagastume about the drivers organizing a union. Ramos testified he never spoke to Sagastume about Hernandez and the Union. Ramos testified Hernandez was a

starting to organize. Sagastume testified the conversations occurred on different days. Sagastume testified she had a conversation with Ramos in the lunchroom around 5 weeks before she was fired concerning the Union. Sagastume testified Ramos said he was hearing some ugly things about this business of the Union. Ramos said he had a relative who worked in a place that had a union that was not good for anybody. Ramos said the Union would take money out of their checks, and they were going to equalize the salaries taking money out of their paychecks. Ramos said I am your supervisor, if you want to ask for a vacation or anything like that I will grant it to you at any time, but if there is a union, they do not want it, they will not grant it to you.

<sup>47</sup> I have also credited Sagastume's testimony as to her other conversations with Ramos about the union campaign as described in this decision.

<sup>48</sup> Ramos was an argumentative witness giving the perception he had something to hide.

<sup>49</sup> Ramos testified he knew Sagastume was married to Hernandez, and that Sagastume referred to him as Fernando.

driver and all the drivers were involved in that. Ramos testified, "I never thought he would do so, but he was involved with that." Thus, Ramos admitted he specifically knew of Hernandez' union involvement. Ramos testified he thought the executive managers did not want a union at the company. However, Ramos testified he tried to avoid talking about it, and he was not interested as to whether a union came in.

At the time of the union campaign, Ramos was supervising a department that contained about 40 employees working for CSPC. There was an organizing campaign going on amongst the 200 drivers at CSPC. Ramos claims that he received no training concerning the union campaign was undercut by Corso who testified his managers and supervisors received training as to what they could and could not say concerning the union to the employees. In fact, Respondent argued in its February 15, 2011 pre-hearing position statement that Ramos never questioned Sagastume about her husband's union activities because "all supervisors and managers received training on what they legally could not say or do in relation to the union organizing effort."<sup>50</sup> Indeed Foca who worked for ECFC, not CSPC, claimed he received such training. The memo Corso received from the outside consultants to handle the union campaign called for supervisory training, and advocated a proactive stance amongst the supervisors in the conversations with employees concerning the Union. In fact, Sagastume credibly testified Ramos summoned the tomato department employees to attend a meeting with Corso where Corso spoke out against the Union. Thus, even though the Union was not seeking to organize the tomato department employees, Respondent purposely brought them into the campaign. Against this backdrop, Ramos' claim that he received no training and never said a word about the Union during the course of the heated campaign is simply not credible. Moreover, Ramos did not appear during the course of his testimony as someone who would sit idly by and not comment to anyone concerning the events of a hotly contested union campaign that was taking place around him. I do not credit Ramos' claims of silence about the topic, or of his claim that he did not speak to or question Sagastume as she credibly testified. As set forth above, I have fully credited Sagastume's account of her conversations with Ramos concerning the union campaign.

On Wednesday, November 17 at 8:32 p.m. Foca sent an email to Corso copied to Zeleznik, Jay Krupin, an attorney in Respondent's law firm, and to Moore the subject of which was tomato line organization realignment. The email reads in part:

After considerable analysis and review of the existing Coastal management team, it was determined that the structures in place at ECFC were best suited to operate the tomato/repack operation. Dave (Zeleznik) began the management transition several weeks ago. At this point we have concluded the transition and analysis of the operations. We will be implementing the following changes tomorrow morning:

Promotion of three team members to line the positions similar to the ECFC value stream leaders in place (repack, tomato repack, & tomato sort)

Elimination of the repack administration position (with duties reassigned to existing ECFC admin team)

Implementation of ECFC's pay scale which will result in some increases in wages and no decreases

<sup>50</sup> See GC Exh. 30, page 5 fn. 5.

The email stated Zeleznik will be announcing these changes in a group meeting tomorrow morning. Foca testified the implementation of the tomato line transfer took place on November 18. Sagastume was the only one of about 40 tomato department employees who were terminated as a result of the department transfer. Among those transferred some received pay increases and some were promoted and received pay increases.

Sagastume testified she attended a meeting on November 18 in the human resource office. She credibly testified as follows: Morgan conducted the meeting which was attended by two other human resources personnel, one of whom served as a translator. The meeting started around 8:00 a.m. Sagastume arrived at the normal time for work and Ramos told her Zeleznik had called her and she should go upstairs. When Sagastume went upstairs Zeleznik was not there. Morgan told Sagastume to come in and sit down. Morgan asked her if she knew why she was there and Sagastume said she did not. Morgan told Sagastume they had another person to do Sagastume's job. Sagastume said that was fine they should train the person because sometimes it is very difficult. Sagastume said in those days they were very busy and she told Morgan that would be a help. Morgan told Sagastume the position was that of an accountant, that they have someone with that type of experience and the person is going to do the job. Sagastume asked what Sagastume was going to do and Morgan said she did not know and therefore Sagastume was fired. Sagastume thought this might be a joke because she was not expecting it. Morgan told Sagastume she needed to sign a document that Morgan was holding, and if she signed the document the company would pay Sagastume four weeks of vacation. Sagastume told Morgan she was not going to sign anything, and they could keep the four weeks of vacation. Sagastume told Morgan to give her the papers so she could take them with her and Morgan said she could not give them to Sagastume. Sagastume grabbed the papers from Morgan. Sagastume said she needed to pick up her things, and Morgan said you cannot go back to the work area unless you are accompanied by one of them as that was the company rule. Sagastume became upset and told Morgan she had never stolen anything so she should be able to go down to her workplace. Morgan said definitely not you cannot go down. Sagastume called a coworker who retrieved Sagastume's purse and Sagastume took the purse and left through the door they told her. Following the meeting, Sagastume repeatedly called Ramos, but he would not return her calls. The agreement Morgan asked Sagastume to sign is entitled, "Severance Agreement." It states the parties to the agreement are Sagastume and CSPC.<sup>51</sup> Morgan sent an email sent on November 18 at 9:02 a.m. to the HR department and payroll, and with a copy to Vasquez, the driver's supervisor. Morgan states in the email please disable Sagastume's tomato line building and system access immediately. Morgan states she may not enter CSPC property without a security or HR escort. It states, "Her husband, Driver, Luis F. Hernandez is still employed with us, so we have reason to believe she may return." The subject of the email was "termination of employment" and it was labeled

of high importance. Ramos was not copied the email.

Sagastume testified she would not be able to work in a position that required her to write, read and speak mostly in English. Sagastume did not interact with the customers as part of her job. She was earning \$21.67 per hour at the time of her termination. Sagastume sometimes helped other employees in the repack area. When she worked in repack she earned the same amount per hour as when she worked on the computers. Sagastume testified it took her 15 years with the company to reach her hourly rate. Sagastume testified A. Hernandez and Perdomo worked on the reports for the computers when Sagastume was not present. Sometimes Perdomo would also help her with the computer work when things were really busy. Sagastume did not do any of the computer work for the tomato line, only repack. Ramos trained Sagastume on the spreadsheets she used. She was not trained on other computer programs or other spreadsheets.

Sagastume recalled the addition of the Giant Foods business to the tomato department. It made the tomato line and repacking area busy due to increased work. She testified the Giant business started around the beginning to middle of October. Sagastume did not know Jeremy Clark, but did know Zeleznik. She testified when the Giant business started to get busy, Zeleznik started coming to the tomato line and repacking area. Sagastume testified the Giant business was just tomatoes, so it just impacted the tomato line, not repack. Sagastume testified she thought Respondent hired four additional employees to work on the tomato line due to the Giant business. A list of employees employed in the tomato line department who Respondent asserts were transferred from CSPC to ECFC on November 18 includes about 40 employees. As of November 17, the vast majority were earning between \$7.80 and \$9 per hour. The list included Perdomo showing a March 8, 2004 date of hire earning \$18.35 an hour; and Jose Hernandez (referred to herein as A. Hernandez) with a October 30, 2007, hire date earning \$15 an hour. The list does not include Ramos the supervisor. The only employee who was not transferred on November 18 was Sagastume. Sagastume was listed with a September 1, 1997 hire date. She was by far the employee with the greatest seniority in the department. The second most senior employee was hired in 2003.

#### *D. Events following Sagastume's November 18 termination*

Clark testified two union meetings were held in Hernandez' home in December, and he was the only employee in whose home union meetings were held. Clark did not recall the specific dates of the meetings, stating they were get out the vote meetings leading up to the election. Clark testified attendance at the Union's meetings began to decrease around mid-November coinciding with the termination of Sagastume.

Corso and Foca each claimed that on Friday, December 10 they first learned Hernandez supported the Union. They testified they were going to lunch and saw Hernandez distributing union literature outside Respondent's facility.<sup>52</sup> On December

<sup>51</sup> During the November 18 meeting with Morgan, no one told Sagastume how much money they were offering her to sign the termination papers, but that it would be the equivalent to 4 weeks vacation pay. Sagastume testified she did not receive any severance pay, but, following the meeting, she did receive vacation pay that she had previously earned.

<sup>52</sup> Corso and Foca's testimony here is contradicted by Respondent's pre-hearing position statement which states they did not learn of Hernandez' union activity until he was named as election observer for the Union. The letter naming Hernandez as an election observer was faxed to Respondent on December 14. The position statement states that prior to that time management did not know Hernandez was a union supporter and in fact they thought he was against the Union. (GC Exh. 30, p. 5). The variance in these stories evinces a shift in Respondent's

11 at 6:44 a.m. Caplinger sent an email to Corso concerning a conversation she had with a driver named Miller. Caplinger stated Miller said he feels the other drivers should give Corso a chance to fix their pay, and if they do not like it they can always bring the Union in later. Miller mentioned “Fishy” made \$110,000 last year and might feel it was unfair that “we make billions and don’t pay more.” Miller said Fishy was fighting for principle, and Miller wanted to know what Caplinger did to “piss” him off so bad that he was not happy. Corso testified Hernandez was commonly referred to as Fishy in the work place.<sup>53</sup> Hernandez identified a December 13, letter to Corso. The letter is signed by Hernandez, Vargas, and 11 other employees stating the undersigned employees were part of the Union’s organizing committee. On December 14, the Union sent Respondent a fax identifying Hernandez as the Union’s sole observer at the December 17 election.

On December 16, the day before the election, Hernandez was given a route assignment to Virginia Beach. He left to do the route run at 2:30 or 3 a.m. but did not return home until 10 to 10:30 p.m. that evening. Hernandez identified photographs he took that day. He testified they show that 25 percent of the boxes in his load were broken in that they were cut with a knife. Hernandez testified he called his supervisor, Vasquez, and told him the boxes had been cut and sent him the photographs. Vasquez stated he did not understand why so many boxes were broken or why they had given Hernandez so many stops.<sup>54</sup> Hernandez testified when he picked up a cut box, the produce fell and a lot of times he had to pick up the whole load. Hernandez finished the route at 5:30 p.m. in Virginia Beach and he arrived home at 10:30 p.m., giving him about 6 hours before he went back to the Respondent to serve as an observer for the election beginning at 3 a.m.

The election was held on December 17, from 3 a.m. to 7:30 a.m. and 9:30 a.m. to 12:30 p.m. at Respondent’s facility. Corso testified that on the day of the election, Foca was responsible for being out front to escort the NLRB agent onto the property based on a request Corso made to Foca on December 16. Foca testified he arrived at work on December 17 at 1 a.m. Foca’s usual start time was 7 a.m. Foca testified he came in early to support his management team concerning the election. Foca testified as a board member Foca wanted to be present. Foca testified it was “A very tough, emotional day.” Foca testified he spent the morning with the guard in the parking lot at the guard shack. Foca testified he was not instructed to do this, that he did it on his own. However, Foca testified Corso knew Foca was out there. Foca testified he was not reporting what he saw to Corso. However, when shown an email correspondence between himself and Corso, Foca then testified, “Okay. I was letting him know what I saw sitting out front of our building --”

The December 17 tally of ballots shows there were 41 votes

position. Regardless, as set forth in more detail in the Analysis section of this decision, I find that Corso and Foca were aware of Hernandez strong pro union stance prior to Sagastume’s termination.

<sup>53</sup> The tone of Caplinger’s email using Hernandez’ nickname to Corso suggests she was aware that Corso knew of Hernandez’ pro-union stance, and that it was well known at Respondent’s facility.

<sup>54</sup> Hernandez testified every day he used a different truck and he never knew his route in advance. Hernandez testified the routes were assigned by Vasquez, and Vasquez’ assistant. Hernandez testified they, along with night supervisor Justin Callas, knew the truck Hernandez was going to use.

cast for the Union, and 136 against.<sup>55</sup> On December 18, Corso sent an email including the following remarks:

In the end we crushed them. This whole thing cost a lot of money, a lot of disruption and a whole lot of friction. But we won, decisively.

Many didn’t understand unions before this started. They do now. And they voted overwhelmingly against it. “Not in our house”.

My focus now shifts from “not now” to “not never.”

*E. The testimony of Respondent’s witnesses concerning Sagastume’s termination and the transfer of the tomato department from CSPC to ECFC*

Corso is the president and CEO of CSPC and CSI. In January 2010, the tomato department, as run by CSPC, reported to Stalio Callas who reported to Moore, vice president of operations of CSPC. Moore reported to Corso. The tomato department had essentially two large areas. It had tomato lines in which the employees sort tomatoes by size, color, and ripeness. The repack area is also part of the tomato department. It takes 20 pound cases of produce and breaks them down into smaller units typically four or five pound packages to meet customer requirements. Corso testified the tomato department was the only operation at CSPC that was a manufacturing operation. Corso testified one of the tests used when talking about a manufacturing company is you are creating value added in referring to the ripening process in the sorting of tomatoes. Corso testified the tomato department at the time of its acquisition from L & M was more in line with the ECFC side of the business since ECFC is a manufacturer while CSPC is a distributor.

Corso testified as follows: On November 18, ECFC took over the management of the tomato department from CSPC. Earlier in 2010 there was an opportunity to do the retail tomato business for Giant Foods. Corso started hearing in July concerns by Foca, the president and CEO of ECFC, about the tomato department and a desire to take it over by ECFC. Corso thought this made sense because he did not think the tomato department should be part of a distribution business. Foca stated he thought the business could be better managed by himself and Zeleznik than by CSPC. Corso told Foca he needed to talk to CSPC officials Lambros and then Moore to get them on board and if they could work it out great. Sometime in September, Foca told Corso that Moore agreed to the department transfer, and then Corso talked to Moore about it. The three of them then met in an informal meeting concerning the matter. Corso held partnership meetings at 8:30 a.m. on Fridays. The transfer of the tomato department was a topic of discussion at these meetings in July and August. Notes are not taken at these meetings. Corso had final approval of the transfer. The first delivery of tomatoes to Giant was around October 14 or 15, and the initial deliveries did not go well. Corso received feedback from Foca, Lambros, and Tom Brown. Foca said the Giant deliveries were not meeting Giant’s specifications. They were struggling getting the product out on time. Consequently, Foca felt there was an urgency to accelerate the transition of the tomato department from CSPC to ECFC. Corso told Foca to do what he had to do as it was an important piece of business.

Corso testified the next time he heard from Foca about the transfer of the tomato line was on Wednesday, November 17

<sup>55</sup> The Union did not file any objections to the election or any unfair labor practice charges.

when Corso received an email at 8:32 p.m. The email included the elimination of the repack administrative position which Sagastume had occupied. Corso testified he was not involved in the decision to eliminate the position and he just knew what was written in the email which was to reassign the duties to the existing ECFC administrative team. Corso testified the decision to eliminate the repack administrative position was Foca's decision. Corso testified he did not know the position was going to be eliminated before he received the November 17 email and it was never discussed with him. Corso testified a day or two after he received the email, Corso asked Foca what lead to his decision to eliminate the position, and Foca said they did not need the position, it was completely redundant. Corso did not know who was working the position at the time he received the November 17 email, but he subsequently learned it was Sagastume from Foca at the time of their conversation. Corso testified prior to November 17, he had no personal knowledge that Hernandez supported the Union and Foca never told Corso the elimination of Sagastume's position was motivated in any part by her husband's support of the Union.

Foca testified in the tomato department there is an area called manager's desk/admin area which contains three desks, and three computers, and two or three phones.<sup>56</sup> Foca testified this is the area where Ramos, Perdomo, and A. Hernandez sit. They were the manager and two assistant managers of the tomato department at the time of the hearing. In the fall of 2010, prior to her termination, Sagastume would also sit there and perform administrative work.

Foca testified Ahold Foods (Ahold) is the largest customer of ECFC. He testified Ahold is the holding company for Giant Foods. Foca testified Giant in Landover gave CSPC the opportunity to provide whole tomatoes at the retail level. Foca testified CSPC had never engaged in that type of activity in terms of sales at the retail level. However, ECFC was accustomed to working with retailers since half of ECFC's business is at the grocery store level. As a result, Foca testified he led a team consisting of Zeleznik, the general manager and vice president of ECFC, and Jeremy Clark in analyzing the tomato department operations. Foca testified the possibility of CSPC obtaining the Giant tomato business first materialized in April. Foca learned about it through conversations with Giant buyers. Foca testified he argued for the transfer from CSPC to ECFC because he was concerned that under the CSPC system of management they were going to mess up a large opportunity with ECFC's number one customer. Foca argued it was not getting the required attention and CSPC did not have the skill set to deliver a retail product as Giant expected. Foca testified he was concerned because it was ECFC's customer and the account involved the reputation of ECFC's salesperson.

Foca testified the first time he considered moving the tomato department to ECFC was right after July 4. He testified they had started sending Giant some samples in late June, and once they started receiving feedback it occurred to him that he needed to help the tomato line. They expected to have their first shipment of tomatoes to Giant in August, but internal issues with Giant delayed the business. Foca identified an email exchange between himself and Jason Lambros, vice president

of purchasing of CSPC, dated July 6. The emails set up a meeting between Foca and Lambros on July 7. Foca testified he wanted to talk with Lambros about why Foca believed ECFC could do a better job managing the tomato department. Foca testified that, as of July, they had not made decision to transfer the tomato department. Foca testified he also began discussing the transfer with Moore, the vice president of operations for CSPC, in July. He testified the transfer discussion would have come up at their weekly Friday executive meeting. He testified Foca, Lambros, and Moore attended that meeting. Foca testified that Corso generally attends the Friday executive meetings and the transfer of the tomato line was discussed with Corso during the meeting. Foca testified Corso told Foca and Moore to work it out between them and to let Corso know what was right for the company.

Foca testified that by September, Moore agreed that ECFC should run the tomato department. Foca testified Moore said she would inform Stalio Callas, who at the time was in charge of the tomato department, and let Callas know Zeleznik would start working with Ramos, the department supervisor, and that eventually the department would be turned over to ECFC. Foca testified the final decision was made by himself and Moore in September a few weeks before they had Giant's first tomato order. Foca testified that at the next Friday meeting they let Corso know they had come to a decision and roughly how they envisioned the department working. Foca testified they envisioned Ramos reporting to Zeleznik, and ECFC would take over the management of the line, and they were going to implement ECFC's value stream model of operation for the department and see where they had low efficiencies before they implemented the transfer.

Foca testified Zeleznik started becoming involved with the tomato department in September when Moore and Foca agreed the department was to be transferred. Foca testified Zeleznik was told to the model the tomato department design after that of ECFC system of operation. Foca testified Callas was also told Zeleznik was going to be taking over the operation, not immediately, as they needed to work through the plan. Foca testified they delivered their first order of Giant tomatoes on October 14. Foca testified the delivery was under CSPC. However, Foca testified the Giant account was managed by ECFC because it was their relationship with the customer. Foca testified that, as of October 14, all the employees on the tomato line continued to work for CSPC and CSPC sold Giant the tomatoes. Foca testified Zeleznik was involved in the operation of the tomato department in October, but officially he started managing the operation on November 18, the date the tomato department was formally transferred to ECFC. Despite the November 18 transfer of the tomato department to ECFC, Foca testified the department remained, at the time of the hearing, under CSPC's profit and loss statement, and the tomato department supervisors and employees continued to be paid by CSPC.

Foca testified Giant's initial order of tomatoes shipped on October 14 by CSPC was for 500 cases. Foca estimated that CSPC received the order at least a week prior to the shipment date. Callas was managing the tomato department at the time, but it was not Callas primary focus so Ramos was basically running the department. Foca testified that Giant business was a 5% increase in their volume with specs the tomato department had never seen before. Foca testified in September Ramos did not officially start reporting to Zeleznik, but somewhere between September and October Ramos knew Ze-

<sup>56</sup> Foca took a recent photograph of the tomato department. He could not identify a phone on the desk, or credibly testify to a certainty that he saw one there. I do not find that it has been established on the record that there is or ever was a on phone on that desk.



leznik was going to be his new boss. Callas had been basically out of the picture beginning in September and Ramos unofficially was reporting to Zeleznik in September. Foca testified Zeleznik was basically running the operation based on the new client and new standards in September. Zeleznik officially took over on November 18, which was the day they made the announcement to the company of the department transfer, the elimination of Sagastume's position and three promotions to lead persons within the tomato department.

Foca was involved in an email exchange on October 29, with David Devries, a financial analyst with a Coastal Sunbelt email address, to the size of the projected Giant business for 2011. Foca estimated Respondent would process 1,800 cases of finished tomatoes per week for Giant. Foca testified that this amount of tomatoes for Giant is about 10% of the tomatoes that go through the tomato line on a weekly basis. Foca testified it is a very significant volume. He testified the other 90% is distributed between approximately 1500 to 2000 customers. On November 3, Clark emailed Foca a chart Clark created containing pictures demonstrating the proper size, color, and packaging for tomatoes that met Giant's specifications as a visual aide for tomato department employees.<sup>57</sup>

Foca testified it was his decision to eliminate Sagastume's position and the decision was made in October. He did not know the date in October. Foca testified he talked to Zeleznik on Friday, November 5, saying they were going to have to implement the tomato department transfer and they had already worked out all of the plans. Foca stated he told Zeleznik Clark is on vacation in 2 weeks, that Foca was out next week in New York, and when Foca returned from New York he wanted the transfer implemented. Foca testified they needed to promote three people and get the structure going. Foca testified Zeleznik agreed to put the final touches on the transfer and when Foca returned Zeleznik would have a communication plan ready. Foca testified they started servicing the Giant account on October 14, but at that point they had not decided to eliminate Sagastume's position. Foca testified they were discussing the possibility of it and they decided to do it sometime before November 5 because as of November 5 their final plan came together. He testified in the plan three people were also being promoted. Foca testified he discussed the decision to eliminate Sagastume's position with Zeleznik.

Foca testified as follows: They did not officially transfer the tomato department to ECFC until November 18 because they had to determine if there would be two or three value streams as per the ECFC style of operation. Zeleznik and Clark had to perform certain analytical work. They looked at Sagastume's

position and concluded there was an opportunity to be more efficient because ECFC already had a nine person admin department who were well versed in costing product. The ECFC admin department could easily absorb what looked to be the 15 to 20 hours of administrative work Sagastume performed.<sup>58</sup> Foca testified they could send someone down from the ECFC administrative department to physically work at the tomato department and still complete the customer service work the ECFC admin employees were doing. The ECFC administrators worked under Zeleznik. The ECFC admin department included a manager and eight employees. The ECFC administrators answered phone calls from the customers and they input customer orders. They also handle customer complaints. The ECFC administrators do the daily cost for the product ECFC produces using a complex costing model. Foca testified most of their customers speak English and the costing the ECFC administrators performed is more complex than that performed by Sagastume. Foca testified they determined Sagastume did not have the skills needed to work on the ECFC customer service team answering the phones and learning the more complex systems. However, the nine ECFC administrators were well suited to take over Sagastume's spreadsheet. He testified the intent was to improve the spreadsheet and move it into the ECFC complex system to increase the level of accuracy. Foca testified the ECFC administrative team had to cover the phones for customer service 16 hours a day. Foca testified the phones could have been transferred downstairs to the tomato department, and they could do that job while they were completing the spreadsheet in the tomato department. Foca testified it was his decision to eliminate Sagastume's position. Foca used information provided by Clark and Zeleznik in making that decision. Foca testified he stated to them that they had nine people in the admin team at ECFC that could do Sagastume's work and who are better suited to do the work because they work with a more complex costing model that they wanted to eventually move to the tomato line.

Foca testified he had the authority to eliminate Sagastume's position without discussing it with Corso. However, he did inform Corso right before they implemented it. In this regard, Foca sent Corso email on the evening of November 17 summarizing the department changes to take place the morning of November 18, including the elimination of Sagastume's position. Foca testified that he did not discuss the matter with Corso before he sent the email to him. Foca testified Corso had no knowledge of what was going on concerning Sagastume. Foca testified he had discussed the department transfer with

<sup>57</sup> Foca initially testified he received the chart from Clark on September 24. However, Respondent later produced the actual email from Clark to Foca showing the chart was sent to Foca on November 3. Foca testified that, as of November 3, the tomato department was not doing very well in meeting Giant's specifications which was why they developed the chart. Foca testified Giant would call about complaints concerning the tomato department. Foca did not recall any emails from Giant about it, or remember receiving any written complaints. He testified the time frame of the complaints was from July through October 14 as part the sampling process for Giant. Foca testified Giant had very defined specifications for their tomato in terms of sticker placement, color, weight of the case, how many tomatoes would make up a 10 pound layer, sugar content, and shelf life. Foca testified when CSPC had trouble meeting the specifications, he assigned Clark to focus on this project. Foca testified it was in July when they started doing actual samples for Giant.

<sup>58</sup> Foca testified that, prior to the November 18 transfer of the tomato department to ECFC, Clark spent extensive time watching the tomato line, and timing each process, including how much time was spent in administration. Foca testified he learned through Clark that Sagastume spent 15 to 20 hours a week on administrative duties. Foca testified Clark began the study in July and completed it in October. Foca testified, following her administrative duties, Sagastume would primarily work on the repack line, and occasionally on the tomato line. Foca received no written report analyzing Sagastume's work in the repack admin repack position. He testified he never sat in with Sagastume to see the work she performed. The only way Foca knew how many hours Sagastume spent in front of a computer was Zeleznik and Clark. Foca testified that, as of November 5, they understood the work Sagastume performed and there was no need for an analysis of her work. Foca testified, "We understood it and we understood that it could fit in nicely into our existing admin. team." Foca testified Sagastume's high hourly rate was one of the reasons her position was eliminated.

Corso and Corso knew they were going to implement ECFC model. Foca testified he knew 2 to 4 weeks in advance Sagastume's position was going to be eliminated. They gave her no notice. He testified they told Sagastume at the same time they announced it to the company and they offered her a severance package in lieu of notice. Foca testified he has not hired any new employee to replace Sagastume. Foca consulted Zeleznik and Clark prior to making the decision to eliminate Sagastume's position. Foca testified they agreed and Zeleznik also had to get confirmation from the ECFC administration manager that they could handle the workload. Foca testified they could. Foca testified Hernandez' union activities played no role in the decision.

Foca testified several weeks prior to the November 18 department transfer, Zeleznik started talking to Ramos and "started the transition of, hey, here's what's going to be happening. You know, this is value streams and understanding that, and really started to take ownership. Dave started taking ownership for that line." Foca testified Ramos did not participate in the decision to eliminate Sagastume's position. Foca testified it was not Ramos' level of expertise. Foca testified it was more Zeleznik's level looking whether it could work within ECFC administration. However, Foca went on to testify that Ramos was definitely consulted about the decision. Foca testified, "but it wasn't -- he wasn't any decision maker necessarily." Foca testified Zeleznik would have talked to Ramos as he was going through all of these different moves telling Ramos this is what they were looking at doing. Foca testified prior to November 5, Zeleznik would have had conversations with Ramos. Foca testified "that was the transition of bringing Julio in the loop." When the questioning resumed by Respondent's counsel, Foca, as if hedging his bets as a witness, testified, "I do not know that for sure." Foca testified, "That's what I would expect to have happened, but Dave Zeleznik would be a better person to talk to him. I wasn't in those conversations." Foca testified, "I know that Dave had conversations with Julio about the transition that was going to take place and about the model we're putting in place. And maybe I'm wrong for speculating, I would think that he would talk to him about the entire plan." Foca testified he would have thought Zeleznik would have spoken to Ramos about the elimination of Sagastume's position for a smooth transition. Foca testified he would have thought the conversation would have had to take place, but he was not sure of the timing of when Zeleznik talked to Ramos about it, or the fashion he talked to him. When asked if Zeleznik had a reason to keep it a secret, Foca then testified they did not want to get too much information out. As a company they try to keep some things tight, "so we have a chance to have face-to-face conversation with people before it starts to leak out." Foca testified he at first assumed Zeleznik would have talked to Ramos about the elimination of Sagastume's position, but there were "reasons that I can't be 100 percent sure."

Foca testified the company did not inform Sagastume of her termination until November 18 because Foca had been away in New York the prior week, and he wanted to be present when the announcement was made. Foca wanted to make sure the senior executive team was there to support Zeleznik. Foca testified this was the main reason for the delay. Foca testified Respondent's waiting until Thursday November 18 to implement the decision as opposed to implementing it on Monday, November 15 would have been just the operation of the busi-

ness not getting to it the first thing on Monday.

Foca testified he returned to his office at Respondent's facility from New York for part of the day on Friday, November 12. Foca worked at his office from Monday, November 15 to Thursday, November 18. Foca left for Rochester, New York, on Thursday evening November 18. Foca testified they implemented the department transfer on November 18. Foca testified he sat down with Zeleznik and said today we have got to do it. He testified Sagastume was not terminated for improper conduct or performance, they just decided to excess her position. Foca testified he had finalized the decision to terminate Sagastume before he left for New York on November 5, which was the Friday he spoke to Zeleznik. Foca testified he had made the decision prior to the November 5 conversation. Foca then testified the decision was made some where between mid-October and the first week in November.<sup>59</sup>

Foca testified that on November 18, the supervision of the tomato department was transferred from CSPC to ECFC. Ramos, the manager of the tomato department, now reported to Zeleznik. However, Foca testified the employees and supervisors in the tomato department, following the November 18 transfer, were still on CSPC's payroll although they are reporting to ECFC management. Foca testified CSPC still pays for the rent for the space used by the tomato department. When the tomato department went to ECFC, the personnel retained their CSPC seniority dates. Their seniority, benefits, and pay for most of the employees did not change when they went to ECFC. The only change is they are reporting to Zeleznik who reports to Foca. Prior to that, they were reporting to Callas, who reported to Moore. Callas remains employed by CSPC. Foca testified that above the hiring level, ECFC has a different pay structure than CSPC. ECFC has a supervisor band, an assistant manager band, and employees who are line leaders. He testified CSPC does not have that structure. Foca testified that when the tomato department was transferred to ECFC they applied the ECFC model to the department. They promoted three employees to the position of line lead, one over the Giant tomato line, one over the general tomato line, and one over the repack line. Foca testified the pay raise for the line leads started on November 18.

Foca testified Sagastume's job before her position was eliminated was costing the spreadsheet. This means when the product comes over to the tomato department there is an original cost of the product. Then the spreadsheet adds how much labor in sorting it took to get the product to the next stage. He testified if there are tomatoes thrown away, the cost would be added into the finished product, which is called the yield. Then there would be some paperwork printed in the beginning of the day that would show inventory levels and help guide them on what to make that day. Foca testified, in the first 2 or 3 months following Sagastume's termination an admin employee from ECFC came and sat at one of the tomato department desks and took over Sagastume's admin duties using the Excel spreadsheet that had been used by Sagastume. However, Foca testi-

<sup>59</sup> Foca testified they considered placing Sagastume in a different position with ECFC. However, in her situation at her skill level they could not place her as an employee because it would not match her pay rate. Foca testified the position Sagastume would best fit would be paid \$7.50 to \$8 an hour on their production line or the tomato line. However, Sagastume was making \$21.67 and the company had a philosophy against offering someone a lesser paying job. Foca testified they make only lateral moves or promotions.

fied by the time of the unfair labor practice hearing in July 2011, tomato department managers Ramos, Perdomo and A. Hernandez had assumed Sagastume's duties. Foca testified the admin employee they had working with the repack line for a few hours a day had been reassigned to work in a labeling operation. Foca testified at the time of her transfer, the managers stepped up and said it was not much work and they could do it themselves because they had made some changes and streamlined the process.<sup>60</sup> Foca testified the Excel cost sheet Sagastume used is still being used by the tomato department, and Ramos, Perdomo, and A. Hernandez are using the cost sheet.

Foca testified the tomato line still uses Excel to do administrative work, as does repack. Foca testified ECFC software has never been used in the tomato department, and Ramos, Perdomo, and A. Hernandez have never been trained on ECFC software. Foca testified it was determined the ECFC software was not needed due to the simplistic nature of the information used in the tomato department. Foca testified Ramos, Perdomo, and A. Hernandez will never need to learn the ECFC software unless they make a change in the tomato line. Foca testified he thought the administrative work at issue takes about 15 to 20 hours a week. Foca testified the work has not changed much since Sagastume's termination. Foca testified Ramos, Perdomo, and A. Hernandez do not take direct calls from Giant. Foca testified you do not have to take calls to do a costing sheet. Rather, you have to take calls to work in the ECFC admin team. Foca testified no one has to take a call from a customer to do the work in the tomato department. Foca testified at the time he eliminated Sagastume's position he expected the team of nine admin that sat upstairs at ECFC to do her work. Foca testified the tomato department management team does the job today.<sup>61</sup>

Foca testified he spoke to Ramos about the Giant tomatoes extensively in July, August, September, October, and November because Ramos was directly involved in trying to help get the specifications right. Foca testified, "The day before the

transfer, I most likely did not talk to him because we were rolling it out on the 18th and I don't--Julio may not have been--" Foca testified he talked to Ramos about Giant tomatoes, but Foca personally got very little input from Ramos about the transfer. Foca testified, "Some ideas but more or less the team, Dave and Jeremy were down there working with him."

Zelevnik testified he is employed by and oversees ECFC. Zelevnik reports to Foca. On the ECFC side, Zelevnik has four value stream managers who report to him, including an admin manager. Zelevnik testified he directs the tomato department which includes the tomato line and repack line. Ramos, A. Hernandez and Perdomo report to Zelevnik. Zelevnik testified his role in the transfer of the tomato department to ECFC was to understand the processes and look for opportunities for efficiencies, increased productivity, and for possibilities of expansion.

Zelevnik initially testified he was first involved in discussions of the transfer of the tomato department to ECFC around mid-September. The discussions were with Foca, with Clark in the room. Zelevnik testified Foca stated he had preliminary discussions with CSPC officials Moore and Lambros about ECFC possibly taking over the management of the tomato department. Zelevnik testified it was also discussed that they had business coming from Giant Foods which was a repack of tomatoes to be packed in the right size and colors in display ready boxes and this was going to be a significant volume of business. Zelevnik testified the amount of Giant business coming to the tomato department was the major reason it was being considered for transfer to ECFC. Zelevnik testified Clark had spent some time at the tomato department during the summer and he was involved in sampling items to send to Giant to make sure their samples met Giant's specifications. Zelevnik testified as the project manager, Clark saw opportunities for better efficiencies using what Zelevnik termed as lean manufacturing. He testified in September when it was decided to move forward as Giant business became imminent, it was decided ECFC should take a look at seriously directing the department. Zelevnik testified the initial samples for Giant were hit and miss. He testified it was very important for Giant to have an exact size tomato in a pretty tight range of color. Zelevnik testified in September he was very positive that the transfer was going to happen after meeting with Foca since Foca had spoken to Moore and Lambros.<sup>62</sup>

Zelevnik testified he thought the transfer officially took place on November 17. Zelevnik testified between mid September and November 17, Zelevnik started spending daily time at the tomato department instead of just deploying Clark, who had been there from time to time to oversee the Giant samples. Zelevnik started spending daily time there to learn the operation. Zelevnik also began reviewing sales and profit and loss numbers. Zelevnik testified he was hoping to see improvements, labor cost reductions, and to open up additional capacities. Zelevnik identified Foca's November 17 email stating the

<sup>60</sup> Foca testified they were going to move someone else to the tomato department to do the work, but the managers said they could handle it. Foca testified the person who was doing it for 2 or 3 months came from the ECFC admin team and she was earning about a \$10 to \$12 an hour when she did the work Sagastume performed. Foca testified at the time, she was also answering phones, taking orders, working on costing at ECFC. Foca was not sure if she was taking calls at the tomato department desk. Foca testified the person may not have verified inventory as Sagastume had done. Foca testified she worked part of her day in the tomato department and then she came back upstairs to the ECFC admin area. She did not work on the tomato department production lines. Foca testified the employee speaks English, and some Spanish. Foca testified now it is just the three supervisors doing the inputting that Sagastume had performed. Foca testified he is not claiming Sagastume could not do job as it currently exists in the tomato department. Foca testified that as of the time of the hearing none of the nine ECFC administrative employees sat at the tomato line desks. Foca testified the Giant tomato orders do not affect the work done on repack, which was performed by Sagastume.

<sup>61</sup> Foca testified the pay scales were changed in the tomato department to be a similar model as ECFC pay scales. Foca testified Ramos, A. Hernandez, and Perdomo fit the model of value stream managers, which at ECFC are salaried positions. Ramos was already a salaried worker, and A. Hernandez and Perdomo were changed from hourly paid to salaried. Foca testified they were not changed to salaried personnel at the time of the department transfer. Rather, they were converted to salaried personnel at the time of their annual review effective February 1, 2011.

<sup>62</sup> There was a shift later on in Zelevnik's testimony as to the transfer of the tomato department. As set forth above, he first testified they first discussed it in mid-September, and he phrased his testimony that he knew it was likely to happen at that time. However, Zelevnik later testified Foca had told Zelevnik in September the decision to transfer the department had already been made. Zelevnik then claimed for the first time that they had probably talked about the transfer was in random conversations prior to September. Zelevnik testified he thought he remembered these conversations starting in July.

tomato department was officially coming to ECFC under Zeleznik's management. The announcement included the promotion of three team members to line lead positions similar to the ECFC value stream leaders in place (repack, tomato repack, and tomato sort), and the elimination of the repack administration position with duties reassigned to the existing ECFC admin team. Zeleznik testified each line within the tomato department needed to establish supervisors to run the day to day operations as the reason of the promotion of the employees to line leaders. Zeleznik testified the three new line leaders were Maria Rivera, Blanca Rosales, and Rosa Vasquez.<sup>63</sup>

Zeleznik testified the elimination of Sagastume's position was based on his, Clark, and Foca observations from September forward. Zeleznik testified it was the focus on the day to day operations and Foca looking at what went on administratively in the repack line as a function of maintaining an Excel spreadsheet used for costing purposes and maintaining production of what was to be produced on a daily basis. Zeleznik testified it was probably a couple of hours a day job. Zeleznik testified it could be easily replicated. He testified intercompany there are purchase orders and sales orders that need to be administered. They receive purchase orders from vendors, adjust company inventory, and then distribute them in what is called ship the bill. Zeleznik testified the spreadsheet work was sporadic, and it is done on a daily basis by people in the ECFC admin department.

Zeleznik testified when Sagastume's position was eliminated he thought ECFC administration could absorb all of the accounting based functions such as purchase orders, sales orders, inventory, and adjustments. Zeleznik testified he thought the daily costing spreadsheet would be maintained by Perdomo, the assistant manager of the repack line. At the time, Perdomo was supervising the repack line within the tomato department. Zeleznik testified it was Foca's decision to eliminate Sagastume's position, although Zeleznik concurred based on observations of the work done there, and that ECFC admin department could absorb a good portion of the work. Zeleznik testified the ECFC admin department picked up purchasing, purchase orders, sale orders, shipping and bills for the tomato department just the same as they were already doing within ECFC. Zeleznik testified Sagastume was doing a lot of inputting in Excel. He testified he believed Sagastume could ship a purchase or sales order, but he knew the admin department could do the same thing without adding any disruption, and without adding hours or personnel. Thus, Zeleznik's description of Respondent's plan concerning the elimination of Sagastume's position differed from that of Foca's. Foca testified it was his plan that one of the ECFC admin personnel would spend part of the day at the tomato department performing daily inputting of data that Sagastume had performed, while Zeleznik testified it was his plan that Perdomo would perform that work, while the ECFC admin personnel would perform the purchase and sales orders for the department.

Zeleznik testified he first learned of the decision to eliminate Sagastume's position in early or mid-November. Zeleznik was told by Foca. Zeleznik testified he did not discuss the position elimination with Ramos before it was eliminated. Zeleznik

testified he discussed it with Ramos, "After the fact. Literally the --day that it happened." Zeleznik testified from a supervisory standpoint, Ramos, Perdomo, and A. Hernandez worked a great deal of hours because they were also doing a lot of work directly on the lines. They had to cover for each other's absences, by line, and things of that nature. The tomato department is a six day a week operation, and Sagastume's position was the only one where Zeleznik could find redundancy, and what they saw as redundant could be absorbed by existing ECFC personnel and by the department. Zeleznik testified the tomato department is in a physically separate area in the plant from the ECFC operation. Zeleznik testified he did not think it would be a viable option to make Sagastume a line worker as she had a pay rate of \$21 an hour, and line workers were averaging \$7.50 to \$8.25 an hour. Zeleznik testified at the time he was evaluating redundancies, he did not have knowledge that Sagastume or her husband supported the Union.

Zeleznik testified that, at the time of the hearing, Perdomo was in charge of doing the repack administrative work. It is the same spreadsheet Sagastume worked on. However, it only involved a couple of hours of work a day. Zeleznik testified he did not time how many hours a day Sagastume spent in front of the computer, stating he was not down there every day. Zeleznik testified he asked Ramos how long Sagastume would spend on this, and Ramos said 2 hours a day spread out throughout the day.

Zeleznik identified an email he sent dated November 11, setting forth his itinerary for the following week. It shows a leadership committee meeting scheduled for Wednesday, November 17 at 7:30 a.m. Zeleznik testified the leadership committee is a group of operations and sales managers intercompany, CSPC and ECFC that was held on a monthly basis, and with the CFO, which at the time was Mike Flanagan. Zeleznik did not know if he went to this particular meeting. Zeleznik testified Stalio Callas, Tom Brown, Caplinger, Flanagan, Justin Callas would have attended the meeting.<sup>64</sup> Foca could have been there, and Corso occasionally attended. Zeleznik claimed he could not recall whether the union campaign was discussed during these meetings, stating it could have been.

When asked when he learned the department transfer was going to take place on November 17, Zeleznik appeared to equivocate in his answer. For example the following exchange took place:

JUDGE FINE: Well, when did you learn of this definitely happening, that -- it happened on a Thursday, right? Was that a Thursday?

THE WITNESS: It could have been. I believe it was the 17th.

JUDGE FINE: The transfer occurred or --

THE WITNESS: We were talking--

JUDGE FINE: It occurred on the 17th, right?

THE WITNESS: We were talking in earnest about making this live as early as the 4th, and it was a function of when we actually were prepared to roll it out and I had been meeting with people--

JUDGE FINE: When did you know -- learn it was going to be the 17th?

THE WITNESS: I'm sorry?

<sup>63</sup> As of November 17 prior to the transfer: Rivera had a hire date of December 16, 2004 and was earning \$8.90 an hour; Rosales had a hire date of July 11, 2007 and was earning \$8.15 an hour; and Vasquez had a hire date of November 11, 2008, and was earning \$7.70 an hour.

<sup>64</sup> Morgan's November 2, memo states Nixon informed her that Nixon reported Vargas' union activities to Justin Callas.

JUDGE FINE: When did you learn that it was actually going to happen on November 17th?

THE WITNESS: That was when we were ready to make it happen. I had all my i's and t's crossed.

JUDGE FINE: Well, how many days before the 17th did you learn it?

THE WITNESS: I'm not sure I follow your question.

These types of answers continued. Zeleznik then testified as follows:

JUDGE FINE: So by November 4th, you would have known--there was a meeting--

THE WITNESS: It was coming.

JUDGE FINE: And you were told it was going to be the 17th?

THE WITNESS: I don't recall being told it was going to be the 17th. I knew it needed to be done as soon as possible. I probably--

JUDGE FINE: Well, when did you learn it was going to be the 17th?

THE WITNESS: I'm assuming--I don't recall exactly but I'm assuming as I understood it, somewhere between the 4th and probably the middle of the following week. I don't recall the 17th ever being a set date. I just recall it being as soon as possible.

JUDGE FINE: Do you know why it happened on the 17th?

THE WITNESS: No, I don't. No, I don't.

Zeleznik testified that as of November 4, he wanted to do the transfer within two weeks. Zeleznik testified their pay periods start on a Tuesday. Zeleznik testified, "so any planning or forefront, you either want to announce it the morning on a Tuesday." Zeleznik then testified without explanation, "Or you want to announce it maybe the Friday before." Zeleznik testified pay raises would have been activated on a Tuesday. He testified in this case it would have been the following Tuesday, but he did not recall which day. When asked if the line leaders received backpay to the day of the transfer for pay increases, which was announced to the employee population on Thursday, November 18, Zeleznik responded, "Probably, but I don't recall." Zeleznik repeated he did not know why the transfer happened the day it did. When asked if any told him why, or gave him advance warning as to the date, Zeleznik testified, "No. I think there was a function leading up to where are we? Okay. Lines are set, people are set. We know who are supervisors are going to be." Zeleznik testified he did not know the decision that went behind picking that particular day. Zeleznik testified he did not remember when he was told it was going to be the 17th. Zeleznik testified it was possible he was first told on the November 17 by Foca that it was going to happen that day.

Zeleznik testified he took over the management of the tomato department in earnest in early November, as "I knew I was going to be running it, full front." He testified he started running it in certain degrees in mid-September. Zeleznik testified he started talking to Ramos every day concerning the tomato department in mid-September. Zeleznik testified that after November 17, everyone in the company knew that everything regarding the tomato department went through Zeleznik, rather than Moore and Callas. Zeleznik testified as of November 17, he was not doing anything differently. Zeleznik testified prior to November 17, Ramos started giving more and more information on his day to day operations to Zeleznik.

Aside from payroll, Zeleznik testified he began managing the tomato department in earnest prior to October 13 or 14 whenever the first large Giant order was shipped. Since November 17, Zeleznik also has been handling the payroll functions, and Callas is no longer involved. However, payroll functions for the tomato department still go through CSPC.

While Zeleznik testified he planned to have Perdomo do the administrative work in the tomato department at the time of the department transfer, Zeleznik testified Lorena Cruz was an individual who works for ECFC who went to the tomato department to do some administrative duties. Zeleznik testified Cruz worked there for a few weeks at least. He testified Ramos, Perdomo, and A. Hernandez have taken on the work Cruz performed. Zeleznik testified the way the work comes it is just as efficient for them to do it in real time as things are completed. Zeleznik testified when Cruz was performing the work it was very hit or miss. It is very fluid and every day is different depending on the volume of work, with products coming in and flowing out. Zeleznik testified the person doing the administrative work needs to be in the tomato department for portions of the work. He testified the reason it has fallen on the three managers to complete is what do you do with that person with all the down time. Zeleznik testified during down time, Cruz was able to go into ECFC side of admin and do some of the same functions she was doing for the tomato line in the ECFC database for ECFC inventories, which was part of her original job as well. Zeleznik testified anything that needed to be shipped or purchased order wise could also be done remotely if need be from the ECFC admin team from their location upstairs. Zeleznik testified the physical functions in accounting side such as purchase orders and sales orders can be done remotely. The do not have to be done on site at the tomato department. Zeleznik testified he was told Sagastume did purchase orders. He did not see Sagastume do one.

Zeleznik testified an employee named Marcelina Robles currently sits at the tomato department desk and does some of the repack spreadsheet work in the tomato department. Zeleznik testified he sees her doing it one day, and the next day Perdomo is doing it. Zeleznik testified Robles spends no more than 10 hours a week doing the Excel work, probably 7 or 8. Zeleznik testified he did not consider Robles as being transferred to the department. He testified Perdomo showed Robles how to do the computer work so there was a backup person in his absence. He testified Robles has been performing the work on an occasional basis because Perdomo has a day off during the week and/or on Saturday. Zeleznik testified that, at that time of the hearing, Robles has been doing the work for at least a couple of months. Zeleznik did not know if Robles was in the tomato department prior to November 17. However, Respondent's records reveal Robles was in the tomato department prior to the November 18 transfer. Robles did not begin inputting information into the computer until a around couple of months prior to the hearing. Robles primarily speaks Spanish.

Zeleznik testified that at the time the tomato line was transferred to ECFC, Zeleznik anticipated Perdomo performing Sagastume's work. Zeleznik testified he anticipated Perdomo doing it himself for at least the upcoming 3 to 6 months following the transfer. Zeleznik testified Perdomo did it for the first couple of months. Zeleznik testified Lorena Cruz was working on SBT admin functions, and learning how to do the Excel spreadsheet. SBT is their accounting system for Coastal for purchase orders, sales orders, and invoicing. Zeleznik testified

Cruz was not doing the tomato department spreadsheets, except on Perdomo's day off.

Ramos testified he is employed by CSPC as a supervisor of the tomato department, which consists of about 36 people. Ramos has worked at the facility a long time, and has supervised the tomato department for around 6 or 7 years. Ramos testified Clark works with Foca and Zeleznik. Ramos testified Clark worked with Ramos on the tomato line around October. When Clark came they were trying to work together to fix many things in the department, including a machine. Ramos testified Clark had ideas to make things easier for Ramos so the department could work better. Ramos testified he did not work with anyone else on the line in October aside from Clark.<sup>65</sup> Ramos testified Zeleznik did not perform work with him on the tomato line prior to Zeleznik becoming his boss. Ramos estimated Zeleznik became his boss in October or November.

Ramos testified there are currently three team leaders in the tomato department. They became team leaders some time after Zeleznik became Ramos' boss. Ramos testified he and Zeleznik made the decision to make them team leaders. Ramos testified he had a conversation with Zeleznik about making them team leaders, but he could not recall the date. Ramos testified there were three team leaders because there are three groups, one for packing and repack, one for breaking down the boxes of tomatoes, and the last is for the tomato line.

Ramos testified Sagastume worked with Ramos on the tomato line for about 3 or 4 years. Ramos was her supervisor. Ramos testified Sagastume made Excel spreadsheets, and she did all of the paper work for the line. When Sagastume did not have any more work on the computer, she helped her co-workers. Ramos testified that on busy days, Sagastume's computer work took 3 and 1/2 to 4 hours a day. Ramos testified it was complicated in that every time three or four things came out, Sagastume had to input them on the computer. Ramos testified Sagastume worked an 8 to 8 and 1/2 hour day, so she worked 3 and 1/2 to 4 hours with the other women in the department. Ramos testified Foca and Zeleznik told him Sagastume was no longer going to work for Respondent after she was terminated. Ramos testified when Sagastume left, they told him. They did not ask Ramos opinion about her leaving. Ramos testified, "They told me that she left and it sort of took me by surprise."

Ramos testified when Sagastume left CSPC, Foca and Zeleznik told Ramos they had an employee who was going to do Sagastume's work on the spreadsheet. The employee's name is Lorena Cruz. Ramos testified Cruz was still working at the tomato department at the time of the hearing, and she began the work the afternoon Sagastume left. Ramos testified Cruz was working at ECFC before. Ramos explained Cruz comes at times to help, and sometimes "we" do it. Ramos testified when Cruz came down, she worked 8 hours a day splitting time between work at ECFC and the tomato department. When Cruz started at the tomato department, Ramos had to show her how to use the spreadsheet Sagastume used because the codes for the products were different. Ramos testified it took him a short

time to show Cruz. Ramos testified there are hundreds of product codes in repack which is the spreadsheet work Sagastume performed. He testified some memorize the codes, others rely on a sheet listing the codes as you do not see all the products all of the time. Ramos testified he knows all the product codes. Cruz relied on a code sheet. Ramos testified it did not take Cruz any longer than Sagastume in entering the codes because Cruz does the same thing in ECFC production. However, Ramos testified Sagastume had all of the codes memorized.

When initially asked how many hours a day Cruz works in the tomato department, Ramos did not answer directly. Rather he testified she works both inside at ECFC and outside at the tomato department. Ramos testified sometimes when it is busy Cruz is there. Then Ramos testified Cruz sometimes works there three hours a day, sometimes less. Ramos testified when they need help they call her, if not no. When asked how many days a week Cruz works in the tomato department, Ramos testified it depends on how busy it is. He explained the days when the most help is needed are Thursday and Friday. On those days, they keep Cruz busy in the afternoon; and around 3 or 4 p.m. she does a few things for them. Ramos testified sometimes Cruz does not come to the tomato line, they take the papers up to her and she does them in her office at ECFC. Ramos testified she knows how long it takes to repack a box because they created a sheet stating how many boxes and how long it took. Ramos testified Cruz comes Thursdays and Fridays to the tomato department, and sometimes they take the papers up to her. Ramos testified Cruz works 8 hours a day including inside in ECFC production department and outside on the tomato line. The ECFC production department is where they cut up fruit and vegetables. She does the spreadsheets for the ECFC production department and the labels there. The tomato line is outside in the cold. When asked how many hours a week Cruz works for the tomato department, Ramos testified she can work between 2 to 3 hours, to 6 to 7 hours in Ramos' department. The rest of the time, Cruz is working at ECFC doing another job, including labels and the spreadsheets for ECFC. Cruz does not work inspecting or repackaging tomatoes.

Ramos testified everyone in the tomato department including Cruz is Spanish speaking. Ramos testified A. Hernandez does the repack spreadsheet when Cruz is not there. Ramos testified the job is very easy. Ramos testified he was teaching the line leaders to do the repack spreadsheet, but they said it was boring and stopped doing it. Ramos testified he trained Marcelina Robles to do it. Ramos testified Robles learned it very quickly. Robles does the spreadsheet when Cruz is not there. Ramos testified Perdomo also does the spreadsheet sometimes. Ramos rarely does it. Ramos testified it currently takes five people to do the spreadsheet job because it is easy, if it were difficult no one would want to do it. Ramos testified the spreadsheet requires inputting information into the computer as the repacking is occurring. He testified you have to wait until three different classes of produce come out and then you input it all at the same time. He testified that on the spreadsheet you input the number of employees repacking, the price, the number of boxes packed, and the time it takes to repack the product.

Ramos testified he is in charge of the tomato department, and if there is something he cannot solve, he calls the managers by phone or sends a message and they solve it. He testified he does not have to keep them informed very much. Ramos testified he had conversations with Foca after Sagastume left.

<sup>65</sup> Ramos was shown an email dated September 24 from Clark to Ramos concerning the status of the Giant tomato program. Ramos at first testified he never saw the email before. Ramos testified he can read English, however, he had difficulty reading the email at the hearing. Upon further questioning, Ramos maintained he did not know if he saw it before, and could not authenticate the document.

Ramos testified he was not having conversations with Foca prior to Sagastume leaving stating, “I almost don’t talk to them. No, I didn’t talk to him because I’m very, very busy.” Ramos testified after Sagastume left, Foca comes by every now and then, asks Ramos how it is going, then Foca goes back upstairs to his office. Ramos testified some times 15 days or a month went by before he saw Corso, Zeleznik or Foca. Ramos testified since Sagastume was terminated, Foca is the one who comes by and says hi how are you. “Before, I never saw him.” Ramos testified before Sagastume was terminated, they never asked him any questions about his department. Ramos testified that prior to the time the department was transferred to ECFC they told him, “the tomato line had gone to East Coast and that I’m going to be your boss. And that’s it.” Ramos testified before the transfer they told him the group would be moved to East Coast, and that was the only time until after Sagastume left. Ramos testified he only had two conversations with management, one after Sagastume left, and one before they moved the line to ECFC. Ramos testified the morning of the transfer Foca told Ramos that he was going to work with Foca and Zeleznik. Ramos testified this was the only time Foca discussed it with him before it happened. Ramos testified Foca never discussed the Union with Ramos because he spent most of his time upstairs. Ramos testified it was something he did not like to talk about.

#### F. Analysis

##### 1. Procedural matters

A dispute arose concerning items set forth in Counsel for the Acting General Counsel’s subpoena with Respondent contending it related to issues beyond matters set forth in the complaint. As a result of this dispute, at the outset of the hearing I entered into evidence the following analysis in ALJ Exh. 1:

The Respondent asserts that antiunion statements and literature cannot be considered in this case because those statements are protected by Sec. 8(c) of the Act. However, the Board has held that antiunion statements, even if not themselves alleged to be violations of the Act, can be relied upon as evidence of antiunion animus or motivation. *Sunshine Piping, Inc.*, 351 NLRB 1371, 1387 (2007). See, *Overnite Transportation Co.*, 335 NLRB 372, 375 fn. 15 (2001) (employer statements in employee handbooks indicating that the employer values union free working conditions are indicative of union animus); and *Tejas Electrical Services*, 338 NLRB 416, 416 fn. 5 (2002); *Mediplex of Stamford*, 334 NLRB 903, 903 (2001); *Stoody Co.*, 312 NLRB 1175, 1182 (1993) *Gencorp*, 294 NLRB 717 fn. 1 (1989); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Dynatron/Bondo*, 323 NLRB 1263 (1997). See also, *Overnite Transportation Co.*, 329 NLRB 990, 1008 fn. 7 (1999), *enfd.* 240 F.3d 325 (4th Cir. 2001) and *NLRB v. Colonial Lincoln Mercury Sales, Inc.*, 485 F.2d 455 (5th Cir. 1973) (speech by employer’s president, though not an unfair labor practice, could properly be considered as background in reviewing the significance of the employer’s subsequent acts); *J.P. Stevens v. NLRB* 461 F.2d 490 (4th Cir. 1972) (finding anti-union speech as evidence of improper motive); and *Orchard Corp. v. NLRB*, 408 F.2d 341, 342 (8th Cir 1969).

I do not find *Raleys*, 348 NLRB 382, 435–438 (2006), cited by Respondent requires a different result. That case involved

the issue of whether statements distributed in a memo rose to the level of a violation of Section 8(a)(1) of the Act, not whether otherwise lawful conduct can be used as background evidence of an unfair labor practice. In *Wal-Mart Stores*, 352 NLRB 815 fn. 5 2008, also cited by Respondent the Board found a Section 8(a)(3) violation but stated it did not rely on the judge’s finding that animus may be inferred by Respondent’s running an aggressive antiunion campaign. However, I do not find this statement sufficient in the context given to reverse the body of case law cited above. Moreover, the standard for production of subpoenaed materials is that the information sought only has to be potentially relevant.

At the outset of the hearing, counsel for the Acting General Counsel introduced evidence of statements made at meetings conducted by Corso as background evidence of animus. The statements were not alleged as violative of the Act in the complaint, and I informed counsel that I would not make any affirmative findings of unfair labor practices for matters not affirmatively alleged in the complaint. However, Respondent was also put on notice that this evidence was being admitted into the record based on the Acting General Counsel’s contention that it constituted background evidence of animus, and it was up to Respondent to respond to it as it saw fit. (Tr. 138-140). Counsel for the Acting General Counsel was later to state that she was not seeking to amend the complaint to include certain conduct which she was alleging constituted evidence of animus because the Acting General Counsel only became aware of the allegations after the 10(b) period.(Tr. 145).<sup>66</sup> Thus, counsel for the Acting General Counsel did not seek to amend the complaint based upon an argument of closely related conduct to that contained in the charge even with respect to statements occurring during an alleged unlawful interrogation of Sagastume which was set forth in the complaint. Rather, she contended at the hearing that she was only seeking an affirmative finding for matters specifically set for in the complaint, maintaining that matters not alleged were time barred by Section 10(b) of the Act, but that they should be considered as background evidence of animus. I find Respondent was on full notice this position based on counsel for the Acting General’s statements at the outset of the hearing, and on my rulings relating to those arguments. Thus, I have considered conduct unalleged in the complaint as evidence of animus on the part of Respondent to the employees’ union activities. See, *Wilmington Fabricators, Inc.*, 332 NLRB 57, 58 fn. 6 (2000); *Kaumograph Corp.*, 316 NLRB 793, 794 (1995); *Hendrix MFG. Co. v. NLRB*, 321 F.2d 100, 103 (5th Cir. 1963); *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1473-1475 (6th Cir. 1993); and the cases cited

<sup>66</sup> Counsel for the Acting General Counsel’s statement at the time was in the context of a discussion that included evidence that Hernandez had been paid by Respondent for attending its campaign meetings. Despite her contention that the complaint should not be amended at the outset of the hearing concerning matters not alleged due to Sec. 10(b) timeliness considerations, just prior to the close of the hearing, after all parties had rested, counsel sought to amend the complaint concerning Respondent’s payments to employees for their attendance at these meetings. At the time, I denied the motion to amend the complaint with the view that regardless of Sec. 10(b) considerations the motion was untimely, and prejudicial to Respondent if it were to be granted. The motion was not renewed in counsel for the Acting General Counsel’s posthearing brief, and I adhere to my decision at the hearing denying the motion to amend the complaint.

in ALJ Exh. 1 set forth above.<sup>67</sup>

## 2. Case law pertaining to alleged discriminatory conduct

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).<sup>68</sup> The elements commonly required to support a finding of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993).

The law is clear that knowledge of an employee's union activity may be established by reasonable inference. *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 983 fn. 36 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009). See also as discussed in *Windsor Convalescent* the following: *Active Transportation*, 296 NLRB 431, 431-432 (1989), enfd. 924 F.2d 1057 (6th Cir. 1991) (knowledge inferred where, inter alia, three of four discharged employees engaged in union activities in the presence of employee who was an informer for the employer); *Clark & Wilkins Industries*, 290 NLRB 106, 106 (1988), enfd. 887 F.2d 308 (D.C. Cir. 1989), cert. denied 495 U.S. 934 (1990) (imputing supervisor's knowledge to employer where supervisor observed organizing campaign in small shop). It has also been long established that

<sup>67</sup> In view of the counsel for the Acting General Counsel's position at the hearing that conduct not alleged is time-barred by Section 10(b) of the Act; and/or her failure to make a timely motion to amend the complaint to allege conduct not already listed, I do not find it appropriate to make an affirmative finding of a violation for matters not alleged in the complaint.

<sup>68</sup> It has been long held that it is unlawful to discriminate against a union adherents family members as a means coercing employees to desist from their union activities. The Board has found the discharge of a supervisor to be violative of the Act, where the motivation is designed to thwart the organizational activities of employees who are the supervisor's relatives. See, *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987); and *Brookside Industries*, 135 NLRB 16, 27 (1962), enfd. 308 F.2d 224 (4th Cir. 1962). See also *Golub Bros. Concessions*, 140 NLRB 120 (1962) where supervisory and non-supervisory family members were found to be unlawfully discriminated against because of the union activities of a family member employee. Respondent, in the current case, conceded this aspect of the law in its February 11, 2011 pre-hearing position statement citing *Tasty Baking Co.*, 330 NLRB 560, 579 (2000), enfd. 254 F.3d. 133 (D.C. Cir. 2001), "(holding that husband's protected activities can serve as grounds for a violation of 8(a)(3))" (See GC Exh. 30, p. 6). In *Tasty Baking Co.*, supra., a *Wright Line* analysis was used by the Board to conclude that an employer demoted a supervisor to employee status in violation of Section 8(a)(1) of the Act; and then transferred that same individual, now an employee, to the night shift in violation of Section 8(a)(1) and (3) of the Act all because of her husband's union activities. Likewise, I find that a *Wright Line* analysis is warranted here as to whether employee Sagastume was discharged because of her husband's union activities. See also, *Kenrich Petrochemicals*, 294 NLRB 519, 531 (1989), enfd. in relevant part 893 F.2d 1468 (3d Cir. 1990).

circumstantial evidence including the timing of the alleged discriminatory event and the submission of pretextual reasons in support of it will support a finding of employer knowledge even in the absence of direct evidence of such. See *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1123 (2002), affd. 71 Fed. Appx. 441 (5th Cir. 2003); *Medtech Security, Inc.*, 329 NLRB 926, 929-930 (1999) (circumstantial evidence, including timing, general knowledge of union activity and pretext, supported finding of employer knowledge); *Darbar Indian Restaurant*, 288 NLRB 545 (1988) (finding of knowledge based on employer's general knowledge of Union activity, the timing of the discharge, the 8(a)(1) violations found, and pretext given). See also, *West Motor Freight of Pennsylvania*, 331 NLRB 831, 836 (2000); *North Atlantic Medical Services*, 329 NLRB 85 (1999); *Hospital San Pablo, Inc.*, 327 NLRB 300 (1998), enfd. 207 F.3d 67 (1st Cir. 2000); and *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. mem. 97 F.3d 1448 (4th Cir. 1996). The Board has held that a supervisor's knowledge of union activities is imputed to an employer absent a credible denial of such knowledge. See, *State Plaza, Inc.*, 347 NLRB 755, 756-757 (2006); and *Dobbs International Services*, 335 NLRB 972, 973 (2001). Along these lines it has been long held as set forth in *Shattuck Denn Mining Corp. v. NLRB*, 366 F.2d 466, 470 (9th Cir. 1966), "it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book."

## 3. The present case

In the current case, Hernandez and Sagastume were long term employees at Respondent's facility. Hernandez and Sagastume were married in 1999 and they were husband and wife during the course of their employment with Respondent. They were each working for L & M Produce when Respondent purchased that operation in 2007. They retained their L & M seniority dates while working for Respondent. Hernandez and Sagastume were each working at Respondent's facility for the entity CSPC which shared the facility with ECFC. Both of those entities top managers were paid by CSI the holding company for CSPC and ECFC. Corso is the president and CEO of CSI and CSPC. Foca is the president and CEO of ECFC. Foca reports to Corso. ECFC and CSPC employ a combined work force of about 900 employees. Hernandez worked as a driver for CSPC, as such he did deliveries both local and over the road. Hernandez performed deliveries for both CSPC and ECFC. There were about 200 drivers employed by CSPC in the fall of 2010. Sagastume worked as an administrative employee in the tomato department in the fall of 2010. The tomato department was part of CSPC while Sagastume was employed there. There were around 40 employees in that department, and they all reported to Ramos, the department supervisor.

In the summer of 2010, Hernandez had a conversation with co-workers at a soccer game involving employees of CSPC and ECFC where they discussed the possibility of a strike and forming a union. Hernandez' credited testimony reveals the Saturday following the game, Corso questioned Hernandez at the loading dock at Respondent's facility as to whether there was going to be a strike that day. Hernandez informed Corso that he did not think there was going to be a strike but he reported to



Corso that there was dissatisfaction amongst the employees particularly with the supervisors. Thus, news of dissatisfaction amongst the drivers had spread rapidly throughout the facility quickly reaching Corso. In fact, Ramos testified he had heard of the possibility of a strike amongst the drivers. Around September, Hernandez, with one of his coworkers, met with Local 639 Secretary/Treasurer Gibson at the Union's offices. They discussed problems at work, in particular problems they felt they had with supervisor Caplinger. At that time, they decided they were going to attempt to organize the drivers at Respondent's facility. In fact on September 8, Hernandez attended a union meeting at the union hall with 25 drivers in attendance. Hernandez signed a union authorization card on September 8. He received around 200 cards for distribution during the September 8 meeting. Hernandez gave Javier Vargas a card, which the latter signed on September 9.

On October 6, McWhorter, vice president of sales of CSPC, sent Corso an email under the heading "Driver Thing". McWhorter told Corso that one of the black drivers stated the black drivers were being approached to sign petitions, and that Javier approached him and said they had 120 signatures. McWhorter asked Corso if he and Corso could meet with "the leaders of this thing somewhere off site and have a talk with them?" The email was clearly written with code words conveying that McWhorter felt Corso understood what he was talking about, and that it was in reference to the Union campaign, which by that time was over a month old amongst the drivers at Respondent's facility. Corso incredibly claimed that he did not follow up with McWhorter and that he did not know there was a union campaign at Respondent's facility at the time he received the email.

Corso testified that in early October, Respondent undertook or announced several policy changes at Respondent's facility. He testified the company created an employee suggestion box. They also announced in October a change in the vacation policy allowing employees to take consecutive weeks off. They announced a change in the bonus system rendering it more favorable to drivers. These changes were the result of information Respondent gleaned through holding paid focus groups with the drivers in September to determine the cause of the drivers' discontent. Hernandez attended one of these meetings on September 14, for which he was paid a \$50 bonus by Respondent.

On October 13, Gibson sent a certified letter to Corso requesting that Respondent recognize and bargain with the Union in a unit of full-time drivers stating the Union was prepared to demonstrate majority status. Corso received the letter around October 15. Corso immediately reacted to the Union's request for recognition. Corso testified he conducted meetings with all of the drivers upon his receipt of the letter. Since the drivers worked different shifts and routes, this involved multiple meetings. Hernandez credited testimony reveals that he attended a meeting in which Corso announced he had received a letter from the Union. He credibly testified Corso stated he had made many changes in the company and asked how the employees could pay him back this way. Corso stated he felt like he had been stabbed in the back. Hernandez testified that during the meetings he attended, Corso stated he would never allow the Union to come into his company, that he had lawyers. Corso stated if they presented him with a contract years would pass before he would sign it. Hernandez testified different drivers attended different meetings based on scheduling. Similarly,

Vargas credibly testified he attended a meeting conducted by Corso, with about 20 to 30 drivers in attendance. During the meeting, Corso stated he had received a letter from the Union. Corso said he had heard rumors of a strike, so he had talked to all of the drivers to know the reasons for their discontent with the company. Corso was very upset with the drivers. Corso stated he tried to change things including Caplinger's position as supervisor, which had been the subject of discontent amongst the drivers. Vargas testified Corso implied the drivers had stabbed him in the back because he had tried to change things, and now he had received a letter from the Union stating it wanted to represent his employees. Vargas testified Corso said he would not accept a union in his company, that there would be a process, there would be elections. Corso said due to the Union, he would not be able to offer raises to the employees because the Union had messed things up. Corso said if something happened after the elections, he would not accept the Union, he did not agree with that, and that he could not fix anything until all of this was over. Corso said it was an involved process, and after the election if the Union won, he would not accept the Union in the company.<sup>69</sup>

On October 27, Corso held a phone conference with Respondent's board of directors located in Atlanta. Foca attended this meeting, and was copied an email sent to the board of directors that day prior to the meeting. An attachment to the email detailed developments concerning the Union's organizing efforts. It stated Corso had spoken to all of the drivers about his disappointment concerning the Union's request for recognition, about being careful of the Union's promises versus guarantees, and about union dues and the loss of individuality for the drivers as a result of a union. It showed Respondent was keeping tabs of the union support amongst its employees stating there was a high number of former and (antiunion) workers at Respondent willing to speak out against unions. It stated many business actions were taken in that they now required partnership approval of all terminations, suspended bonus deductions, made vacation commitment for 2 consecutive weeks, developed clear helper policy, reviewed 24-hour off duty police presence for December forward, created a Logistics department, and hired the Hay group. Thus, during the time period after its employees contacted the Union, Respondent made a series of changes to their benefits and its organizational structure. I find these changes occurred to dissuade the employees from organizing a union. Corso testified he discussed at the October 27 board meeting, attended by Foca, that Corso did not feel a union was necessary at Respondent. He testified he felt a third party was an outsider with their own agendas, which would not necessarily coincide with that of Respondent and its customers. He testified he felt the Union was in a state of decline over the past 50 years and Respondent did not need to buck that trend.

<sup>69</sup> The credited testimony of Hernandez and Vargas establish that Corso made statements to groups of employees to the effect that the Company will never agree to union representation amongst its employees. While not alleged in the complaint, these statements constitute evidence of animus as they restrain employees in their exercise of their Section 7 rights because they convey a message that it would be futile for them to join or support a union. see *Maxi City Deli*, 282 NLRB 742, 745 (1987) (finding employer's statement that there would never be a union in his restaurant to be unlawful); *Loby's Cafeteria*, 187 NLRB 420, 420 (1970) (finding employer's statement that he was not going to have a union to be unlawful because it indicated that support for a union is futile); and *Rood Industries Inc.*, 278 NLRB 160, 164 (1986).

Corso testified he was concerned Respondent's customers would react poorly if Respondent's employees were organized.

On October 27, the Union filed a petition for election for a unit of regular full-time drivers. Corso testified he thought Respondent received a copy of the petition on October 27. He again reacted swiftly stating on October 27 he met with all of Respondent's drivers informing them the petition was filed and he did not know when the election would take place. Corso testified he also had two meetings with management following the filing of the petition, one informal and the other more formal. The second meeting included the executive team from both CSPC and ECFC attending the meeting, which included Zeleznik. Corso testified Foca attended both meetings. Corso testified that after the petition for election was filed, Corso authorized the use of increased off duty police presence at the facility to provide 24-hour coverage. Foca testified he participated in the decision to increase police coverage. Corso testified the decision was carried out by the human resources department.

On October 30, Hernandez attended a union meeting at a restaurant around 3 miles from Respondent's facility. Around 30 to 40 employees attended. Hernandez was on the Union's organizing committee, and he helped inform employees the meeting was going to take place. On October 30, Stalio Callas, CSPC's general manager of operations, sent Corso an email detailing drivers' conversations at the work place in opposition to the Union on that date. At that time, Callas had responsibility for the tomato department operations and the employees who worked there.

On November 2, Hernandez and Vargas attended a meeting with Corso in Corso's office at Hernandez' request. The meeting took place in English. When Hernandez started talking to Corso about the Union at the meeting, Corso brought Foca in as a witness. Hernandez told Corso that another driver had informed Hernandez that a driver named Nixon was saying bad things about Hernandez, Vargas, and Hernandez' wife. Hernandez told Corso that Nixon had been referring to them in vulgar terms and accusing them of bringing the Union to Respondent. Hernandez told Corso, in Foca's presence, that they did not have to bring the Union there because they were making good money, they had a good position, and they knew Corso would not like the idea. Hernandez told Corso that he did not like Nixon referring to Hernandez' wife like that, and that if he heard Nixon do so directly Hernandez would fight Nixon. Corso told Hernandez not to do that because Hernandez would lose his job. Corso told Hernandez he had to make a claim with human resources.<sup>70</sup>

Both Corso and Foca testified that when Hernandez referred to his wife during the November 2 meeting, they knew he was referring to Sagastume. Foca's testimony was particularly peculiar in that he testified he did not know either Sagastume or Hernandez prior to November 2, but he admitted to knowing they were married at the time of the November 2 meeting. Moreover, Foca claimed that as of November 2, he had already decided to terminate Sagastume. Yet, despite being called in on November 2, to witness what Corso deemed to be a very sensitive meeting by the fact that a witness was necessary, both Corso and Foca incredibly claimed that Foca never informed Corso of Foca's purported decision to terminate Sagastume

until after the discharge took place on November 18. I have concluded that on November 2, Foca did not inform Corso of his decision to terminate Sagastume because, contrary to his testimony, Foca had not made the decision as of that time. Sagastume also testified she met with Corso in November concerning Nixon's making vulgar remarks about her at the work place. She told Corso that Nixon was accusing Hernandez of being a union organizer. Sagastume credibly testified Corso said he understood and would speak to Nixon.<sup>71</sup>

Following their meeting, Corso took Hernandez and Vargas to human resources on November 2, where they met with Morgan and Vasquez. Human resources is on the same floor as Corso's office. Vasquez was the driver's supervisor and he served as a translator for Morgan. They met with the two drivers, one at a time. Hernandez asked Vasquez why there was so much trouble with the business of the union. Hernandez told Morgan that yesterday driver Arias informed Hernandez that Nixon was talking about Hernandez' wife, Hernandez, and Vargas saying bad things about them and that they tried to bring the Union in. Hernandez said that is not the truth. Hernandez said if Nixon had proof he was trying to bring the Union in, he could show it to Corso. Both Morgan and Vasquez stated Nixon should not be talking about Hernandez' wife like that. Vasquez said even if it were true, he should not bad mouth her. Morgan left the room to talk to Arias who came up to give a statement. While she was gone Hernandez told Vasquez that Nixon making those accusations about Hernandez and the Union was very serious because if the company ever found out they would terminate Hernandez by finding an excuse to fire him, or pressure him to quit. Vasquez did not deny this assertion. He did tell Hernandez he would talk to Nixon so Nixon would not bother him any more.<sup>72</sup>

Morgan's notes reveal she interviewed Nixon on November 2, concerning Hernandez and Vargas' complaints. In the November 2 notes, Morgan included a "Statement provided by Nixon." Morgan reported Nixon stated Javier Vargas gave Nixon a card and asked Nixon to meet Vargas at McDonalds.

<sup>71</sup> Respondent argues Hernandez and Vargas incorrectly telling Corso and Foca that they did not support the Union undermines their credibility. However, Respondent created an atmosphere of fear and coercion at the facility amongst the drivers concerning those that supported the Union. It was in part that fear that propelled Hernandez and Vargas, union activists, to come forward and deny that support to Corso when they were aware that rumors had surfaced about them at the facility. In fact, the Board has acknowledged this in its standards for determining whether an interrogation is coercive, by taken into consideration the truthfulness of the employee's response by finding when an employee misrepresents their pro-union status to the interrogator that tends to signify the coercive nature of the interrogation. See, *Medicare Associates, Inc.*, 330 NLRB 935, 939 (2000). To hold otherwise, an employee who had been coerced thereby providing an untruthful response to their interrogator would then be discredited when they truthfully testified about the questioning. This was acknowledged by Foca who, concerning the meeting, testified if he was in Hernandez shoes he would have come forward to deny his union involvement. The very fact that Hernandez would be placed in a position to have to deny his pro-union status to management in terms of his job security signifies Respondent had created a coercive atmosphere for union supporters at their work place.

<sup>72</sup> Vargas gave a similar account of what he related to Morgan and Vasquez in his meeting with them on November 2, stating he informed them that Nixon was disrespecting Hernandez, Sagastume, and Vargas and that Nixon was accusing Vargas of being one of the union organizers.

<sup>70</sup> In fact, Corso testified he had fostered anti-union drivers to speak out against the Union, during meetings Corso had held with them.

Nixon responded he would think about it and Vargas said no sign it now. Nixon said he had a right to think about it. Nixon said he saw Vargas by the hand trucks with some other guys who were coming and going and they were all talking about the Union. It was stated Vargas later approached Nixon in the parking lot and said he had come to talk to Nixon. Nixon just drove off. He stated Vargas followed him in his car to a light. Nixon stated Vargas got out of his car with a knife in his hand, but Nixon again drove off. Nixon stated he told this to Justin Callas, Erika Perez, and Steven Griffin that morning about the incident. Nixon then discussed some other employees' opinions about having a union. Nixon informed Morgan, as per her notes, that he could continue to work with Hernandez and Vargas peacefully while the investigation was being conducted.

On November 4, consultants RBA sent Corso a proposal under the heading, "Re" Union Prevention Proposal." In his cover letter to the proposal, Brown, the president of RBA, stated to Corso, we hope to provide you with a multitude of reasons why we are best suited in assisting you to defeat the Teamsters. Brown stated, "We will garner a win" provided they had sufficient time to produce results. RBA's plan included weekly group meetings with all voters, as well as one on one employee meetings with each voter.<sup>73</sup> The letter included a 5 week plan of action. Corso signed a contract with RBA on or shortly after November 5. On November 6, he forwarded Foca a copy of the email chain notifying the board of directors that Corso had retained RBA. Corso testified Brown came to the facility and met with some of the managers, including Foca. CSPC agreed to pay RBA between \$125 to \$225 an hour for their services.

Following the hiring of RBA, Respondent began paying its drivers \$25 each per meeting for attending mandatory weekly meetings against the Union. Hernandez' payroll records revealed he received a \$25 bonus for attending each of four of these meetings, which took place on November 18, December 2, December 7, and December 15 totaling \$100 in bonuses. Hernandez testified Corso presided over the meetings he attended, and that there were two RBA officials there. The election tally sheet showed 213 eligible voters. Assuming they were all required to attend the same number of meetings as Hernandez and that they were compensated in the same fashion this indicates an estimated cost to Respondent of \$21,300 for employee compensation alone, not counting the moneys paid to the RBA officials for their time and attendance, and what other contractual costs they may have incurred relating to these meetings and RBA's other activities.

Vargas testified he attended mandatory weekly management meetings concerning the Union, for which he was paid \$25 per meeting to attend. Corso and his assistants presided over the meetings. Vasquez translated for Corso at some of the meetings. In one of the meetings, McWhorter was present. Vargas testified about attending a meeting in Respondent's small meeting room with 20 to 30 people there, with Corso presiding. An RBA official translated for Corso. Vargas credibly testified Corso said if the Union won the first thing they would ask the employees to do was to hold a strike because Corso would not accept their conditions, nor would he sit down and negotiate with them. Corso said if there were a strike, any one of the drivers could be terminated permanently and replaced by an

other driver. He said strikes that took place could last months or years, and he was not about to let that stop his company, and for that reason, the employees could all be permanently replaced.<sup>74</sup> Corso said he was against the Union. Corso said he preferred to shut down his company than to have the Union come and tell him what to do.

Hernandez' credited testimony reveals that on Sunday, November 7, CSPC Fleet Manager Joey Saia, an admitted supervisor, called Hernandez on his cell phone. Saia told Hernandez he wanted to talk to him and it was personal. Hernandez met with Saia at around 5 p.m. that day at Saia's house. Saia said to Hernandez that he wanted to know what was going on with the Union. Hernandez responded he really did not know what was going on. Hernandez said there were a lot of people involved with this problem. Saia said he heard Hernandez was the head of the Union. Hernandez responded they lied to Saia. Hernandez asked Saia who asked Saia to talk to Hernandez and if it was Corso. Saia said no, there was a conversation, and Saia offered to talk to Hernandez because Saia was Hernandez' friend. Hernandez told Saia that he knew Saia was his friend. Saia said he wanted to know who the person is in charge of the Union. Hernandez responded there are too many people on board, it was not just Hernandez, not just Vargas, there were 20 to 25 people. Saia told Hernandez to talk to Corso that Corso is a nice man. Hernandez responded he did not trust Corso. Hernandez said Corso maybe a good person, but when he comes downstairs and talks to the supervisor, all the problems stay downstairs after Corso goes back upstairs. Hernandez told Saia of problems at work and how the supervisors could get Hernandez fired, and of problems he was having with Caplinger. Saia told Hernandez to talk to Corso, explain everything to him, "maybe they can give (you) a different position because you know all the routes." Hernandez said he was sorry, "but I don't trust John." Hernandez said he was going to talk to McWhorter because he had worked with him before, and when Hernandez had an issue he went to him and he fixed it right away. Saia said to Hernandez please talk to the people and try to stop the Union because it is not good for the company. Hernandez said it was not good for the company, but Hernandez needed respect, and that is the point. Hernandez stated he did not have too many issues with the company because he was making good money. Hernandez said he did not know if he came to work one day whether Caplinger would decide to fire him. Hernandez said he wanted to protect his job. Saia said please talk to the guys and try and stop the Union. Hernandez said, "well, Joey, let me try to talk to them....".

I find that Saia's November 7 questioning of Hernandez con-

<sup>74</sup> Corso threatened to provoke a strike by his stated refusal to negotiate with the Union if they won the election. The Board has labeled the threat of a refusal to negotiate as a serious violation of Section 8(a)(1) of the Act. See, *Garvey Marin, Inc.*, 328 NLRB 991, 994 (1999), *enfd.* 245 F.3d 819, (D.C. Cir. 2001). The scenario Corso created to the employees was they would have been unfair labor practice strikers caused by Respondent's refusal to negotiate, and threats to permanently replace unfair labor practice strikers constitute conduct violative of Section 8(a)(1) of the Act. See, *Capitol Steel and Iron Co. v. NLRB*, 89 F.3d 692, 698 (10th Cir. 1996); *WestPac Elec. Inc.*, 321 NLRB 1322, 1372 (1996); and *Decker Coal Co.*, 301 NLRB 729, 748 (1991). This conduct was not alleged in the complaint, but I have considered it as evidence of animus.

<sup>73</sup> The conducting of one on one meetings with voters is a tactic clearly designed to garner voter leanings in the upcoming election.

stituted a coercive interrogation.<sup>75</sup> While Hernandez was the leading union adherent at Respondent's facility he was not open about his status, in fact, he had denied his participation to Corso 5 days prior to Saia's contacting Hernandez. Here, Saia phoned Hernandez and requested a meeting. When Hernandez arrived at Saia's home, Saia asked him what was going on with the Union. Hernandez did not give a truthful response saying that he did not know what was going on, and there were a lot of people involved. Saia then created the impression that Hernandez union activities were under surveillance by stating Saia had heard Hernandez was the head of the Union. Hernandez denied Saia's assertion. Saia persisted stating he wanted to know who the person was in charge of the Union. Hernandez finally admitting he was a union supporter stated it was not just him, not just Vargas, that there were 20 to 25 people involved. Saia instructed Hernandez to talk to Corso. Hernandez then explained his problems at work including those with Caplinger. Saia again told Hernandez to talk to Corso, stating maybe Corso could give him a different position because Hernandez knew all the routes. Thus, there was an offer to remedy Hernandez grievances with a new job if he talked to Corso and changed his prounion stance. Hernandez refused Saia's entreaties to speak to Corso stating Hernandez did not trust Corso. Saia told Hernandez to talk to employees to try and stop the Union because it was not good for the company.<sup>76</sup>

In determining whether a supervisor's questions to an employee constitutes an unlawful interrogation, the Board examines whether under all the circumstances, the questioning tends to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984), aff'd, 760 F.2d 1006 (9th Cir. 1985). In making this assessment, the Board reviews various factors, including whether the employee is an open union supporter, the employer's background (whether there is a history of employer hostility and discrimination), the nature of the information sought (whether the interrogator appeared to be seeking information on which to base action against individual employees), the identity of the questioner in terms of how high they are in the company hierarchy, the place and method of the interrogation, and the truthfulness of the reply. *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000). The Board will determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that they would feel restrained from exercising their Section 7 rights. *Carroll & Carroll, Inc.*, 340 NLRB 1328, 1332 (2003). In Fleet Manager Saia's questioning of Hernandez the elements of a coercive interrogation are met. Moreover, during the course of his coercive questioning, Saia created the impression that Hernandez union activities were under surveillance, and offered Hernandez

the benefit of a new job if he would speak to Corso, cease his union activities and try and convince others to do likewise.<sup>77</sup>

Respondent's officials were engaging in a pattern of these one on one meetings with employees. In this regard, Vargas' testimony revealed that a few days prior to Sagastume's termination, McWhorter, a high level official for Respondent and one of the prior owners of L & M Produce, was calling drivers into his office.<sup>78</sup> McWhorter called Vargas into his office and asked Vargas what he thought about the Union. Vargas told McWhorter it was the only way to fix things with the company because the drivers were not respected and they did not have any guarantees. McWhorter said that was crazy because the Union was not a good thing, it charged for its services, and the Union could only make promises. Vargas said if the Union is so bad, why they did not let the Union explain what benefits it can bring to the employees. Vargas testified McWhorter knew Hernandez and Vargas were friends and from Vargas response it was likely McWhorter knew that Hernandez also supported the Union.

On November 15 at 11:22 p.m., Corso sent an email to Moore, in which he stated, "Checking in. Things going well." In his email Corso asked Moore, "Did we ever follow up on complaints Nixon, Javier, Luis and Myra lodged?" Moore

<sup>75</sup> The questioning of Hernandez by Saia was not alleged in the complaint as conduct violative of Section 8(a)(1) of the Act, and therefore I making no affirmative finding of a violation with respect to its contents.

<sup>76</sup> Similarly, Vargas testified Saia spoke to drivers at work concerning the Union. Vargas testified since Saia is a good friend of all the drivers, he thought he could obtain information from them. Vargas testified Saia asked Vargas if he knew who was doing the union organizing on more than one occasion. Vargas testified that about 2 or 3 weeks before Sagastume was terminated, Vargas told Saia that Vargas was in favor of the Union. Vargas testified Saia knew Vargas and Hernandez were good friends and where Vargas went Hernandez was going to be concerning the union.

<sup>77</sup> Respondent argues in its post-hearing brief that Saia did not serve as an agent for Respondent in his conversation with Hernandez because they were friends and the conversation took place after hours and away from work. I do not find this argument persuasive. Saia, an admitted supervisor, had the title of fleet manager. The Board has held that an employer is bound by the acts and statements of its supervisors whether specifically authorized or not. See, e.g., *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986), enfd. 833 F.2d 1263 (7th Cir. 1987); and *Holiday Inn-Glendale*, 277 NLRB 1254, 1261 (1985). Moreover, during the course of the conversation, Hernandez did not give Saia an honest response as to his union activities clearly revealing he did not view the conversation as friendly. In fact, Hernandez asked Saia if Corso put him up to questioning Hernandez. While Saia did not specifically name Corso as the instigator, Saia informed Hernandez that Saia had been selected to contact Hernandez because they were "friends." That he was acting on Corso's behalf was conveyed to Hernandez by Saia's repeated requests that Hernandez speak to Corso. Saia's actions were in line with Respondent and Corso's anti-union stance which had been repeatedly conveyed to employees through campaign literature, direct statements, and in meetings. In fact, Respondent's game plan called for direct supervisor participation in its effort to combat the Union, as well as for one on one meetings with employees. Thus, I find that, as a supervisor, Saia had actual authority for his remarks, and that Respondent through its course of conduct also clothed Saia with apparent authority. See *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997), enfd. in relevant part 188 F.3d 508 (6th Cir. 1999). I do not find cases cited by Respondent, *Precision Piping & Instrument, Inc. v. E.I. DuPont de Nemours & Co.*, 951 F.2d 613 (4th Cir. 1991) involving an anti-trust action; and *Aliotta V. Amtrak*, 315 F.3d 756 (7th Cir. 2003) a wrongful death action and the facts on which they turned to be applicable here as to Saia's agency status. Moreover, Respondent relies on facts not in evidence to bolster its argument by contending that as fleet manager no drivers report to Saia. In fact, aside from stipulating to Saia's job title and supervisory status, Respondent entered no evidence as to Saia's actual duties on the record. For the reasons stated, I find Saia was acting with both actual and apparent authority as a supervisor and agent of Respondent in his questioning of Hernandez and Vargas as described in this decision.

<sup>78</sup> Similarly, McWhorter called Hernandez and Vargas into his office following Sagastume's termination for questioning concerning the Union. Their testimony revealed he was at the time calling all of the former L & M drivers into his office for meetings.

responded by email dated November 16 at 6:25 a.m. stating “I will check with Erin (Morgan) on the other once she is in.” As to Corso’s question as to how things were going, Moore responded, “Not so good, there was some pro-union talk from the night warehouse team. I will go over the issues when you are in today.” As set forth above, Morgan’s notes revealed she had interviewed Nixon on November 2, and Nixon had given her a statement informing her that Javier (Vargas) had given Nixon a union card and insisted Nixon sign it at the time and Nixon refused. Morgan’s notes reveal that Nixon stated Vargas had subsequently followed Nixon after work in a threatening manner. Morgan’s notes reveal she asked Nixon if he could work with Vargas and Hernandez while her investigation continued and Nixon said he thought he could. This email exchange is revealing on two fronts, first Respondent’s supervisors continued to provide Corso with updates as to the status of union activities at Respondent’s facility. Second that Corso solicited a report on Morgan’s investigation that would reveal to him that Vargas and by strong inference Hernandez were strong union supporters. As the email exchange reveals, Corso asked for the report, and Moore said she would get back to him that day. I do not credit Corso’s claims that he could not recall whether he received a response to his inquiry. In fact, I have concluded he received such a response and once more he had a clear recollection of it.

Sagastume’s credited testimony reveals that on November 17, as around 3:30 or 4 p.m., Ramos, her supervisor, pulled her off her task at the computer, and he engaged her in a conversation. Ramos said he was very nervous and worried about the business of the Union. Sagastume’s said a lot of people were in the same frame of mind, and that everyone at the company was worried because that is the only thing anybody talked about. Ramos said he just wanted this thing to be over with, whatever the outcome. Sagastume said they all felt the same. Ramos said “What do you think of the Union?” Sagastume said they did not have anything to do with the Union as this is something to do with the drivers. Ramos said yes but if the Union came in it was going to affect all of them. Ramos said the ones who were going to be affected the most in this department were Ramos and Sagastume because they earned the most. Ramos said the Union would take money out of Sagastume and Ramos’ checks to level the paychecks of all the others. Sagastume said, “No, that’s not true.” She said she had worked with a company years ago that had a union and that did not happen, and she did not think things had changed. Ramos asked Sagastume what she would do if the Union came in. Sagastume said if the Union came in she would support it. Ramos said he did not think that was going to happen. He said Corso is not going to allow that to happen. Ramos said Sagastume should talk to her friends because Corso told Ramos he prefers to shut down the company rather than allow the Union to come in. Ramos said he did not think this was a good idea. Sagastume said what can we do and Ramos said what you have to do is talk to Hernandez, and he should talk to Corso, and he should talk to the other managers in the company. He should tell them that he repents for what he has done, that he should apologize because they are worried. Ramos told Sagastume if Hernandez apologizes he will continue with his job and nothing will happen. Sagastume said I do not think they are going to overlook this and pretend nothing happened. Ramos said Hernandez should talk to them because so many things have changed, for instance with the drivers. For example, they did not like the supervisor,

and they changed the supervisor. Maybe they might change their mind and they can continue working well. Sagastume said she did not think that was going to happen and she did not think the drivers are going to go back. She said speaking personally for Hernandez, she did not believe he was going to step back and undo what he did. Ramos said if the Union does not come in each of those drivers one by one they are going to send them to hell. Sagastume replied that is what they thought. She said that was their problem and she had spoken to Hernandez about this and she had told him to think it over to see the good things and the bad things. Sagastume said she had spoken to him and that is what they have decided. Ramos said, “Well, look at all of this shit that’s going on.” Ramos stood up and walked away. Sagastume testified the conversation was around 20 to 30 minutes.<sup>79</sup>

I find that Ramos engaged in a coercive interrogation of Sagastume concerning her and her husband’s union activities in violation of Section 8(a)(1) of the Act on November 17. Ramos was a high level company official in that he supervised a department of close to 40 employees. Ramos questioning came with the backdrop of Respondent’s tenacious anti union campaign. In this regard, while the tomato department employees were not part of the bargaining unit being organized, they were required to attend a meeting conducted by Corso in which he spoke out strongly against the Union. On November 17, Ramos pulled Sagastume off her job, and then questioned Sagastume concerning her views about the Union although she was clearly not an open union supporter. The coercive nature of Ramos’ questioning is highlighted by the fact that during the conversation he stated Corso would never allow a union to come in and threatened plant shut closure if it did. Ramos created the impression of surveillance of Sagastume’s husband Hernandez union activities by instructing Sagastume to talk to Hernandez and tell him to talk to Corso and the other managers and tell them to repent for what he has done. Absent Hernandez failure to repent, Ramos threatened unspecified retaliation against the union supporters stating that if the union does not come in, each one of those drivers one by one would be sent to hell. Sagastume responded she had already spoken to Hernandez and that he was not going to step back and undo what he had done.<sup>80</sup> The next day, on the morning of November 18, Sagastume, with a seniority date of 1997, was unceremoniously discharged. While Ramos did not directly question Sagastume about Hernandez union activities, he placed Hernandez union activities in play in such a way as designed to illicit a response about those activities from Sagastume. The Board has held that statements that are not phrased as questions constitute unlawful interrogations when they are designed to elicit responses from employees about their union activities. *Medcare Associates*,

<sup>79</sup> Sagastume testified Ramos had previously asked her two or three times if it was true that Fernando is messing around with the Union. Ramos knew Hernandez as Fernando as Sagastume calls him Fernando. Sagastume testified at the time she told Ramos no because Respondent was trying to find out who it was, and the employees were just starting to organize.

<sup>80</sup> The threat of plant closure, creation of impression of surveillance, and threat of unspecified retaliation were not alleged as separate violations of the Act in the complaint and therefore I make no affirmative findings of a violation of the Act with respect to those actions. However, they serve as evidence of animus and as a backdrop as to the coercive nature of Ramos’ questioning of Sagastume. See, *Carroll & Carroll, Inc.*, 340 NLRB 1328, 1332 (2003).

330 NLRB 935, 941 fn. 21 (2000), citing *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 929 (5th Cir. 1993).

Following her questioning by Ramos, Sagastume returned to her desk and went back to work. She found it unusual that she did not see Ramos for the rest of the day. At around 6 p.m., Sagastume asked A. Hernandez but he did not know where Ramos was. Sagastume dialed Ramos cell phone number two times but he did not answer. Around that time, Sagastume saw Ramos coming down the stairs from where the offices were located including that of Corso. Ramos said, "Oh, well, you haven't left." Sagastume replied she had phoned Ramos phone twice and he did not answer. Sagastume said it is late now and she had to go. Ramos said fine they would see each other tomorrow.

On Wednesday, November 17 at 8:32 p.m. Foca sent an email to Corso copied to Zeleznik, Jay Krupin, an attorney in Respondent's law firm, and to Moore the subject of which was tomato line organization realignment. The email, although it did not mention Sagastume by name, included the elimination of her repack administration position with duties reassigned to the existing ECFC admin team. Foca testified the implementation of the tomato line transfer took place on November 18. Sagastume by far the most senior employee in the department was the only one of about 40 tomato department employees who were terminated as a result of the department transfer. Among those transferred some received pay increases and some were promoted and received pay increases.

Sagastume was summoned by Ramos to a meeting with human resources at 8 a.m. on November 18. Morgan conducted the meeting which was attended by two other human resources personnel, one of whom served as a translator. During the meeting, Morgan told Sagastume they had another person to do Sagastume's job. Sagastume said in those days they were very busy and she told Morgan that would be a help. Morgan told Sagastume the position was that of an accountant, that they have someone with that type of experience and the person is going to do the job. Sagastume asked what Sagastume was going to do and Morgan said she did not know and therefore Sagastume was fired. Morgan asked Sagastume to sign a document, which waived her right of recourse, in return for the receipt of severance pay. Morgan did not inform Sagastume that such a waiver was in the document, which was written in English. Sagastume refused to sign, and Morgan refused her request for a copy of the document. Sagastume grabbed the document from Morgan. Sagastume said she needed to pick up her things, and Morgan refused to allow her to return to the work area unaccompanied by someone from human resources. Sagastume called a co-worker who retrieved Sagastume's purse and Sagastume took the purse and left through the door they told her. Following the meeting, Sagastume repeatedly called Ramos, but he would not return her calls.<sup>81</sup> The agreement Morgan asked Sagastume to sign is entitled, "Severance Agreement." It states the parties to the agreement are Sagastume and CSPC.

Morgan sent an email on November 18 at 9:02 a.m. to the HR department and payroll, and with a copy to Vasquez, the driver's supervisor. Morgan instructed that Sagastume's building and system access were to be terminated immediately.

<sup>81</sup> Ramos refused to return Sagastume's calls although he testified they had worked together for a long time, they were friends, that they frequently talked and she was someone he could trust.

Morgan stated Sagastume may not enter CSP property without a security or HR escort. Morgan stated, "Her husband, Driver, Luis F. Hernandez is still employed with us, so we have reason to believe she may return." The subject of the email was "termination of employment" and it was labeled high importance.

The Union lost the December 17 election. The tally of ballots showed there were approximately 213 eligible voters with 41 votes cast for the Union, 136 against. Thus, the Union went from claiming a card majority on October 13, to losing the election decisively two months later. On December 18, Corso sent out an email celebrating the election results. The email included the following remarks:

In the end we crushed them. This whole thing cost a lot of money, a lot of disruption and a whole lot of friction. But we won, decisively.

Many didn't understand unions before this started. They do now. And they voted overwhelmingly against it. "Not in our house".

My focus now shifts from "not now" to "not never".

I find the Acting General Counsel has established a strong prima facie case of unlawful discharge pertaining to Sagastume. The facts demonstrate strong evidence of animus on the part of Corso and Respondent's officials to the employees' union activities. On October 15, upon learning of the Union's request for recognition, Corso conducted employees meetings in which he expressed personal outrage to them citing changes he had made in employment conditions. Corso characterized their attempt to organize as an act of betrayal stating he had been stabbed in the back. See, *Bankers of Paris* 288 NLRB 991, 991 (1988). Corso stated he would never allow the Union to come into his company, and if the Union won an election he would not accept it. Signifying to employees their efforts to organize were futile. Corso then went on at considerable time and expense to conduct a campaign designed to undermine the Union's support. The Union filed its petition for election on October 27. By November 6, Corso had secured the services of RBA, an outside consultant, which had submitted a "Union Prevention Proposal" with a detailed plan on how to "defeat the Teamsters", and a virtual guarantee that if Respondent secured their services that "We will garner a win". Beginning in mid-November, Corso, with the assistance of RBA officials, began to conduct weekly mandatory meetings with all of its drivers consisting of a unit of over 200 employees, and was paying them each \$25 for each meeting they attended. During these meetings, Corso issued a series of serious threats to employees including a refusal to negotiate by Respondent if the Union won thereby provoking a strike. Corso went on to state the strikers participating in the strike Respondent provoked would be permanently replaced. Corso also told employees he would rather shut down the company than deal with the Union. On November 7, Hernandez the leading union adherent was coercively interrogated by Fleet Manager Saia. Saia questioned Hernandez about what he knew about the Union, and created the impression of surveillance by informing Hernandez that Saia had heard Hernandez was the head of the Union. Saia told Hernandez to talk to Corso with the possibility of a new job for Hernandez if he did so. Saia told Hernandez to try and stop the Union. Hernandez refused Saia's directive to talk to Corso. Late in the day on November 17, Ramos approached Sagastume, Hernandez' wife, using a similar tactic. Ramos asked her what she thought about the Union. He told her she would suf-

fer a pay cut if the Union came in. Sagastume told Ramos if the Union came in she would support it. Ramos informed her that Corso told Ramos he preferred to shut down the company then allow the Union to come in. Ramos told her to ask Hernandez to talk to Corso and the other managers and tell them he repents for what he has done. Sagastume refused Ramos directive to talk to her husband. Ramos then threatened if the Union does not come in each one of the drivers who supported it would be sent to hell.

Respondent's actions, reveal strong evidence of animus towards Union activity starting with Corso and throughout the management staff. While, Corso and Foca denied knowledge of Hernandez' union activities, I have not credited their self serving testimony. First, Sagastume was interrogated and threatened late in the day on November 17, by Ramos concerning Hernandez union activities, and she was told to have Hernandez meet with and apologize to Corso for his actions regarding in the Union. Implicit in the statement was that Corso new of Hernandez union activities. Sagastume refused Hernandez request and returned to work. At that time Ramos disappeared from their work area and failed to respond to Sagastume's phone calls. At the end of the day, Sagastume saw Ramos return to the work area from Respondent's office area where management offices including Corso and human resources were located. The next morning Sagastume, a 13 year employee, was unceremoniously called to human resources, terminated without warning, her severance contract had already been typed up, and she was removed from the facility and barred from further access from the work force, with a letter from Morgan to be on the look out for her return since she was Hernandez' wife. The timing and circumstances of her termination, coming on the heels of her interrogation by Ramos the night before creates the inference that Respondent's decision makers concerning the termination were aware of her husband's union activities, and of her refusal to ask him to cease them. The interrogation by Ramos alone, along with the swiftness of Sagastume's termination following its occurrence, is sufficient to create a prima facie case that Sagastume's discharge was unlawful. Sagastume's termination in the midst of Respondent's course of conduct set forth above leaves no doubt that a prima facie case as been established.

The denial of Corso and Foca's knowledge of Hernandez' union activities is also undercut by several other factors, as is the claim by Foca and Corso that they did not consult with each other concerning the discharge of Sagastume. First, during the course of the campaign, Corso was receiving email reports from several supervisors updating him as to employees' union activities. These include: a report from McWhorter, vice president of sales, on October 6; a report from Callas, general manager-operations on October 30; a report by Moore, vice president of operations on November 16; and Caplinger, transportation manager/logistics manager, on December 11. Thus, four high level supervisors issued written reports to Corso pertaining to the employees union activities at the facility indicating that Corso was keeping those activities under surveillance through supervisory reports being funneled to Corso. Moreover, Moore's November 16 report, stated at Corso's request that she would update him as to the status of Morgan's investigation pertaining to Nixon, Hernandez, Vargas, and Sagastume. I have concluded, contrary to Corso's claims of an absence of recall, that he did receive such an update, which included a statement of Nixon that Vargas had solicited Nixon's signature

on a union card. Such a report would signal to Corso that both Vargas and Hernandez had misinformed him when they claimed they were not for the Union on November 2. The credited evidence reveals that Saia, on November 7, accused Hernandez of being the leader of the union and told him to talk to Corso concerning his union activity with an eye to Hernandez ceasing such conduct; and that on November 17, Ramos told Sagastume to ask Hernandez to approach Corso concerning his union activity and seek forgiveness. The nature of these interrogations and the repeated nature of the request reveals that Corso was the source behind the questioning.

Caplinger's December 11 email to Corso is also insightful. It had been turned over to counsel for the Acting General Counsel as part of her subpoena request as it contains Respondent's numbers for its subpoena production at the lower right hand side of the document. The email describes "Fishy" in a reference to Hernandez concerning the reasons he was in favor of the union. The use of Hernandez nickname implies that there was widespread knowledge of Hernandez strong union support throughout Respondent's facility. At the time of the hearing, both Corso and Foca contended they first learned of Hernandez' union activities on December 10 when they saw him distributing union literature. However, in Respondent's pre-hearing position statement, it was stated that Corso and Foca did not learn Hernandez was a union supporter until they received notification that he was chief observer at the election. It goes on to state that prior to that time they thought he was opposed to the Union. However, it was not until December 14, that the Union sent Respondent a fax identifying Hernandez as the sole election observer. The inconsistency in these statements serves to further undercut Respondent's claims as to Foca and Corso's knowledge of Hernandez union activities and when it occurred. Moreover, the record evidence reveals that prior to Sagastume's discharge three different supervisors, Morgan, Saia, Ramos, and by inference McWhorter had knowledge of Hernandez union activities, and I have concluded, that despite their claims to the contrary, Foca and Corso were apprised of by one or all of these individuals of Hernandez leadership role in the union prior to Sagastume's termination. See, *State Plaza, Inc.*, 347 NLRB 755, 756-757 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001); and *Dr. Philip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983).

I also do not credit Corso and Foca's claims that they did not discuss Sagastume's termination before the event took place. The evidence reveals that Foca shared Corso's anti-union stance, by his own admission and by emails he had sent to Corso and others. The union drive concerned drivers working for CSPC. Foca was the president and CEO of ECFC. However, both ECFC and CSPC were housed in the same building, and shared office space. Moreover, Foca was apprised of and/or consulted by Corso concerning every aspect of Respondent's union campaign. Corso notified Foca of the Union's demand for recognition, and of its subsequent filing of its representation position. Foca was in attendance during Corso's conference call with Respondent's board of directors where Corso discussed Respondent's campaign strategy. In fact, Foca was copied Corso's email sent to the board of director's. Corso called Foca in as a witness to the November 2 meeting with Hernandez and Vargas where they complained about statements by Nixon directed towards themselves and Sagastume accusing them of bringing the Union to the facility. Foca was notified when Corso hired RBA concerning the campaign, and Foca

was consulted about Respondent's going to 24-hour off duty police coverage at the facility during the campaign. Finally, on the day of the election, Foca was asked by Corso to report early at the guard house, where Foca relayed his observations to Corso. Foca was keenly aware of the sensitive nature of supervisory conduct during the course of the campaign, as he testified he had received training concerning it. Foca claimed he determined to terminate Sagastume prior to November 2, and although she was the subject of the meeting he attended with Corso and Hernandez concerning accusations of union activity, he testified he failed to inform Corso of that decision until November 17 when he sent the email to Corso notifying him that the decision had already been made. The November 17 email itself was copied to Respondent's attorney, and it was written in such a way as to set out Respondent's litigation strategy. Foca had the wherewithal to notify Respondent's counsel concerning his actions including Sagastume's termination, but claimed he failed to consult Corso in advance of the decision and implementation terminate a long time employee, who had been the subject of a meeting he attended with Corso concerning accusations of her and her husband's Union activities. In sum, I do not credit the testimony of Foca and Corso that Corso was not consulted in advance concerning Sagastume's discharge. I have concluded their contention here was just part of a litigation strategy in an unsuccessful effort to attempt to shield Corso's avowed antagonism towards the Union from the decision making process.

Accordingly, I have concluded the counsel for the Acting General Counsel has established a strong prima facie case in terms of animus, knowledge, and timing of Sagastume's discharge that it was motivated by her husband's union activity, and her refusal to attempt to persuade him to cease that union activity. Therefore, the burden shifts to Respondent to establish that Sagastume would have been terminated absent Hernandez' union activities.

For the following reasons, I find Respondent's defense concerning Sagastume's termination is pretextual. In the first instance, it must be said that while management of the tomato department nominally changed, there was no actual department transfer. Following November 18, the employees remained on CSPC's payroll, and the location of the tomato department remained the same with CSPC accountable for the rent for the space it was occupying. As of November 18, the changes that were made concerning the tomato department was that ECFC officials Foca and Zeleznik replaced CSPC officials Moore and Callas in the management of the department. Three tomato department line employees were promoted to lead persons, and Sagastume was terminated.

Concerning Sagastume's termination there was no claim that she was not performing her work properly. In fact, Foca testified Sagastume's performance was not an issue, and Ramos testified she was a trusted employee. While Foca and Zeleznik maintained there was an extensive study of Sagastume's duties by Clark prior to her termination, I do not credit this testimony. First of all, Foca, Zeleznik, and Clark's involvement with the department came about as a result of the increase in business and specifications required in Respondent's providing tomatoes to Giant. However, Sagastume's principle function involved inputting information into Respondent's Excel computer program regarding the repack line, which had nothing to do with Giant's tomato order. Rather, repack involved breaking produce products, other than tomatoes, into smaller packages for

customers such as restaurants. Sagastume credibly testified that holidays such as Thanksgiving constituted a busy time in the performance of her work. She testified that during September through her termination she was working in excess of 40 hours a week, sometimes as much as 50 hours a week.<sup>82</sup>

Foca testified that it was his decision to eliminate Sagastume's position, with Zelenik's input. Foca testified that beginning in July he had Clark do analytical studies and it looked liked ECFC's nine administrative employees could easily absorb what looked like 15 to 20 hours a week of administrative work performed by Sagastume. He testified they could send someone down to the tomato department from the ECFC administrative department to perform Sagastume's work and still complete the customer service work the ECFC employees were already performing. Foca testified it was also the intent to improve the spreadsheet Sagastume was using to move it into the ECFC system to increase the accuracy of the spreadsheet. Despite Foca's claims of a need to change spreadsheets for the tomato department, as of the time of the hearing this never occurred. Foca testified phones could have also been transferred downstairs to the tomato department for the ECFC administrative personnel to handle customer service calls while they were completing the tomato department spreadsheet. However, there is no credible evidence that this was ever done or that anyone ever took customer service calls from the tomato department. Foca testified that for the first 2 or 3 months following Sagastume's termination an employee from the ECFC admin department came and sat at Sagastume's desk and performed Sagastume's repack administrative work using the Excel spreadsheet used by Sagastume, and that the ECFC employee was working at the tomato line a few hours a day. Foca testified the administrative employee was transferred out of the tomato department assignment after the 2 or 3 months and Sagastume's administrative work was thereafter completely done by the department supervisors, Ramos, Perdomo, or A. Hernandez. He testified they were never trained in ECFC software and it was determined that software was not needed due to the simplistic nature of the operation of the tomato department. Foca testified the managers do not take calls from customers.

Unlike Foca, who testified Clark had been studying the processes of the tomato line, including Sagastume's position since July, Zeleznik testified the elimination of Sagastume's position was based on his, Foca and Clark's observations September forward. While Foca testified Sagastume's administrative work was estimated at 15 to 20 hours a week, Zeleznik testified it was probably a couple of hours a day job.<sup>83</sup> Zeleznik testified

<sup>82</sup> Sagastume estimated when it was very busy at Respondent she was sometimes spending 35 hours a week typing information in the computer concerning production information for the repack line. Sagastume testified her duties included going through the warehouse to verify that the actual inventory reflected that which was recorded in the Respondent's computer system. She testified she also spent 15 hours a week in the repack department, mainly from 8 to 9 a.m. when she packed produce, or made boxes for packing produce. While Respondent point's out in its brief Sagastume's math may have been off, she testified it was only during a busy periods that she spent 35 hours a week on the computer, the inference being these estimates were based on periods when she worked overtime.

<sup>83</sup> Zeleznik testified he obtained the estimate of Sagastume's hours on administrative work, not from Clark, but from Ramos. This assertion is not credible because Ramos testified on busy days Sagastume spent 3 and 1/2 to 4 hours a day on the computer. Sagastume's credited testimony reveals she was terminated at a busy time of the year. Thus,



he thought the ECFC administration could absorb all of the accounting, purchase orders, sales orders, and inventory adjustments entailed in Sagastume's job, and the daily Excel spreadsheet could be handled by Perdomo who was supervising the repack line. Thus, contrary to Foca who testified it was planned that an ECFC admin employee would come and sit at Sagastume's desk to perform the Excel spreadsheet work, Zeleznik testified it was his plan that this work be handled by Perdomo for at least the first 3 to 6 months following Sagastume's termination. These inconsistencies between the plan Foca envisioned and the one envisioned by Zeleznik whose responsibility it was to run the department upon its transfer, and who testified he was in fact running it prior to the November 18 official transfer support my conclusion that there was no plan to terminate Sagastume until the evening before her termination took place. It also supports my conclusion that the reasons proffered by Respondent for her termination were not drawn through reasoned analysis as Foca contended, but were pretextual and the result of a knee jerk reaction to her husband's union activities and her November 17 refusal to Ramos to try to talk Hernandez out of those activities. Moreover, while Zeleznik testified he thought the ECFC admin department could handle the purchase and sales orders for the tomato department, he admitted he did not even know for sure if Sagastume had done that work. Sagastume also credibly testified that Perdomo was out on sick leave at the time of her termination thereby undercutting Zeleznik's contention that he had studied the situation and planned to use Perdomo on the Excel spreadsheet at the outset of Sagastume's termination.

In addition, contrary to Foca, who testified that an employee from ECFC admin worked at the tomato department performing Sagastume's work for 2 to 3 months, Zeleznik estimated ECFC admin employee Cruz was only there for 2 or 3 weeks before the three tomato department supervisors took over Sagastume's administrative department functions. Zeleznik testified the nature of the tomato department administrative work, which ebbs and flows during the course of the day required the individual performing the Excel spreadsheet work to be stationed in the tomato department full time, which should have been known prior Sagastume's termination if there had been any reasoned analysis concerning her replacement. Yet, it was Foca's testimony that he planned to have all of the work performed by an ECFC administrative employee splitting time between the ECFC admin office and the outdoor tomato department. Finally, Sagastume testified the tomato department was a very noisy place to work due machinery there which included for fork lifts, pallet movers, and the line conveyor belts. This further undermines Foca's claim that a reasoned analysis revealed to him that it was a good idea to have phones placed there so an ECFC admin employee could take phone calls from customers at the department. Thus, there were major inconsistencies in the testimony between Foca and Zeleznik as to the nature of the planning concerning the elimination of Sagastume's admin position, and very little of Foca's alleged plan was actually put into practice supporting my conclusion that

Foca, Zeleznik, and Ramos gave different accounts of her administrative work load. While Zeleznik testified he obtained this information from Ramos, Ramos testified before they terminated Sagastume, they never asked him any questions about the department. The divergence of testimony supports a conclusion of the absence of any planning and that the reasons advanced for Sagastume's termination were pretextual.

there was no real plan. The software was not changed from Sagastume's Excel program to the ECFC program, and there was no evidence that anyone was taking any customer calls from the tomato department. Rather, the evidence revealed the work continued to be performed in the tomato department largely by tomato department personnel in the same manner using the same Excel spreadsheet Sagastume had used prior to her termination.

Zeleznik testified that at the time of the hearing, a tomato department employee named Robles currently spends no more than 10 hours a week performing Sagastume's Excel administrative work, and that she mainly does the work in Perdomo's absence when he has a day off. Of course, Zeleznik originally estimated there was only 10 hours of work a week to be done. However, he testified at the hearing that Perdomo's back up was performing 8 to 10 hours of work alone. Zeleznik also testified Cruz was still doing the spreadsheets on Perdomo's day off.<sup>84</sup> That these employees working continued working on the repack spreadsheet was unknown to Foca as he testified at the time of the hearing the supervisors were doing the work by themselves.

The testimony of Respondent's officials concerning the decision to eliminate Sagastume's position was not only internally inconsistent; it contradicted positions set forth in Respondent's pre-hearing position statement. Respondent's February 15, 2011 position statement to Region 5, described Sagastume's duties somewhat differently than the description provided by Foca, Zeleznik and Ramos. It was stated in the position statement that:

Charging Party worked for Coastal Sunbelt as Repacking Administrator for the tomato/repacking lines. As an administrator, Charging Party inputted all tomato products received by the company into accounting software. She also used Microsoft Excel spreadsheets to compute the cost of the items that were received, and the costs based on repacking the products. (GC Exh. 30 page 4).

However, there was no claim at the hearing that Sagastume inputted computer information related to tomato products. Rather, the testimony revealed she inputted information into the computer related to the repack line which dealt with non tomato produce. It was also stated in the pre-hearing position statement that:

The overwhelming majority of Charging Party's job duties were spent in front of a computer working on various software and cost analysis. A small percentage of Charging Party's job duties involved working on the tomato/repacking lines. (GC Exh. 30 page 7).

However, at the hearing Respondent's officials in particular Foca and Zeleznik sought to minimize the amount of time Sa-

<sup>84</sup> Sagastume's supervisor Ramos testified that on busy days Sagastume's computer work took 3 and 1/2 to 4 hours a day. Ramos testified that when Sagastume was terminated Foca and Zeleznik told him that ECFC admin employee Cruz was going to be doing Sagastume's work. Contrary to Foca, who testified Cruz had transferred out of the tomato department, Ramos testified she was still working there on a part time basis at the time of the hearing, although Ramos was somewhat evasive as to how many hours she spent there a week. Ramos testified that Robles works on the spreadsheet, as does A. Hernandez it and Perdomo does it. Ramos testified he rarely does it. Ramos testified he tried to teach the three department line leaders to do it, but they claimed it was boring and refused to do it.

gastume spent on the computer, in an effort to assert her position was easy to replace by others at the time of her termination. Finally it was stated in Respondent's February 15, 2011 position statement that:

In addition to the timing, Coastal Sunbelt can also show that it would have taken the same actions, regardless of the protected activity, because it was necessary to meet the specification required by the Giant Grocery Stores contract. Coastal Sunbelt lacked the equipment, procedures, and training to meet the demands placed upon it by the Giant Grocery Stores Contract. Moreover, the entire operation fit more in line with the operations of Fresh Cuts, as Fresh Cuts regularly provides value-added services of sorting chopping, cutting, and repacking many different types of produce. Having all value added services under one company also made good sense from an efficiency and economies of scale perspective because it allows the employer to interchange employees based on which lines are slow or busy. (GC Exh. 30, page 9)

Yet, there was no claim at the hearing by Respondent's officials that there was any change in equipment following the nominal transfer of the tomato department to ECFC. Rather, it appeared from their testimony the department remained in the same place, under CSPC's payroll and accounting ledger, and aside from the elimination of Sagastume's position and the promotion of three individuals to lead persons the operation of the department remained essentially unchanged. Moreover, record evidence revealed that ECFC department employees worked inside, were located in a different section of the plant than tomato department employees, and as Sagastume credibly testified they had to meet more stringent sanitary conditions for ECFC customers than customers on the tomato line precluding the transfer between line employees of those two separate operations. They were also under a different payroll system than tomato department employees. There was no contention at the hearing that there was any transfer of the tomato department line employees with ECFC lines employees, or that this was ever contemplated as a reason for the transfer. Thus, there was shifting positions between Respondent's officials as to the planning behind Sagastume's termination and the department transfer at the hearing, as well as between Respondent's position statement and that advanced through record testimony. Such shifting of rationales is evidence that the Respondent's proffered reasons for terminating Sagastume are pretextual. See *Approved Electric Corp.*, 356 NLRB No. 45, slip op. at 2-3 (2010) (citing *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual where different from those set forth in the discharge letters); and *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.").

The timing advanced by Respondent for the department transfer and Sagastume's termination in particular is suspect. Foca testified he determined, through a meeting with Zeleznik on Friday November 5, that they were going to proceed with the transfer. Foca was out of town the beginning of the next week, but returned to the facility on Friday, November 12. Foca was at Respondent's facility Monday through Thursday evening, November 15 to 18. Yet, he waited until Wednesday at November 17 at 8:32 p.m. before notifying Respondent's

personnel including Corso that the department transfer which included the promotion of three individuals with pay raises, and Sagastume's termination was to take place on Thursday, November 18. Sagastume's testimony revealed she had been coercively interrogated by Ramos at around 3:30 to 4 p.m. on November 17, and that she saw Ramos returning from Respondent's offices around 6 p.m. after he was away for a substantial period of time from the work place. Foca offered no good reason as to why he picked Wednesday, November 17 to initiate the department change. In fact, Zeleznik, after waffling in his testimony admitted that although he was the department manager in waiting, he received no advance notice that November 17 was to be the day of the announcement. Rather, Zeleznik testified Tuesday was the start of the pay period at Respondent and it made the most sense for these personal actions to take place on Tuesday. Zeleznik offered no good reason as to why they took place on Thursday, and none was provided by Respondent leading to the ultimate conclusion that Foca's late night November 17 email related directly to Ramos unlawful interrogation of Sagastume on the Wednesday afternoon November 17.

Finally, Ramos testimony supports a finding of pretext. Contrary to Foca and Zeleznik's claims that they worked with Ramos with multiple conversations towards the tomato department transfer, Ramos testified he was not consulted as to the transfer of the department to ECFC. Rather, Ramos testified he only had one conversation with the ECFC officials prior to the transfer, and one after the transfer notifying him that the transfer took place. Ramos testified that although he was consulted about the selection of and the promotion of three line personnel to lead positions, Ramos was not consulted about the decision to terminate Sagastume. In fact, he testified he was surprised by the decision. Sagastume performed a major function in the tomato department including keeping the department work flow and inventory records for repack. Sagastume helped maintain chlorine levels in the tomato ripening process. She credibly testified that, at Ramos behest, when she worked on the tomato line she served in a lead person type capacity in that inspected the quality of the tomatoes and transferred people back and forth between the repack and tomato lines. The failure to consult Ramos, her immediate supervisor about her termination as Respondent was approaching Thanksgiving a busy time, evidences the decision to terminate her was not due to legitimate business reasons, and that it was pretextual. The Board has long held that an inference of unlawful motivation is strengthened when an employer fails to consult with an employee's immediate supervisor before taking action against the employee. See, *Williams Services, Inc.* 302 NLRB 492, 500 (1991); *Lancer Corp.*, 271 NLRB 1426, 1427 fn. 6 (1984); *Industry General Corp.*, 225 NLRB 1230, 1233 (1976), *enfd.* 564 F.2d 99 (6th Cir. 1977); *Midwest Hanger Co.*, 193 NLRB 616, 627 (1971), *enfd.* in relevant part 474 F.2d 1155, 1159-1160 (8th Cir. 1973), *cert. denied* 414 U.S. 823 (1973).<sup>85</sup>

<sup>85</sup> While Foca testified the tomato department was transferred to ECFC because in his view the department needed more supervision, Ramos testified that both before and after the transfer he essentially runs the department with very little input from above. Additionally, Foca and Zeleznik testified that Sagastume was not considered for department retention following the elimination of her position because all she was suited for was line production work at \$7 to \$8 an hour and this was too much of a pay cut. However, sagastume had much more seniority than any of the individuals promoted to lead person at the time

## COASTAL SUNBELT PRODUCE

In sum, I find that counsel for the Acting General Counsel has established a strong prima facie case that Sagastume's termination was unlawfully motivated.<sup>86</sup> Since I have concluded Respondent's defense was pretextual, no further analysis is required. *Rood Trucking Co.*, 342 NLRB 895, 898 (2004). Accordingly, I find Respondent terminated Sagastume in violation of Section 8(a)(1) and (3) of the Act.

## CONCLUSIONS OF LAW

1. Coastal Sunbelt Produce, Inc., otherwise known as Coastal Sunbelt Produce Company (herein Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Drivers, Chauffeurs & Helpers Union No. 639 a/w the International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. By on November 17, 2010 coercively interrogating Mayra L. Sagastume by questioning her about her and her husband's Union activities Respondent has violated Section 8(a)(1) of the Act.

4. By discharging Mayra L. Sagastume on November 18, 2010, because of her husband's union activities, and because she refused to request him to cease in those activities Respondent has discriminated against Sagastume in order to discourage its employees participation and or membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

5. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having discriminatorily discharged employee Mayra L. Sagastume must offer her reinstatement and make her whole for any loss of earnings and other benefits from November 18, 2011, the date of Sagastume's discharge to the date of a proper offer of reinstatement, less any net interim earnings. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

of her transfer. She also was familiar with Respondent's Excel software applications, a function Ramos testified he was unsuccessful in getting all the newly appointed lead personnel to perform. Sagastume described her duties as that akin to a lead person in terms of inspections and rotating other employees between lines. Yet, no valid explanation was given why she was not considered for the lead person position. Regardless, I find the elimination of Sagastume's position standing alone was pretextual. It should be noted that while there was a claim that Sagastume was excessed purportedly to save money, her administrative functions were purportedly largely transferred to Perdomo and Hernandez, and around that time period they were promoted and made salaried personnel.

<sup>86</sup> I find the nominal transfer of the tomato department to ECFC from CSPC was a sham transaction to shield Sagastume's unlawful discharge. Following the transfer, the department remained in place, remained on CSPC books and payroll, employees retained their seniority and Ramos largely ran the department with little input from higher management before and after the purported transfer. However, regardless of whether the department transfer is considered to be a legitimate transaction, I find Sagastume's discharge to be unlawfully motivated for the reasons stated.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>87</sup>

## ORDER

The Respondent, Coastal Sunbelt Produce, Inc., otherwise known as Coastal Sunbelt Produce Company located at Savage, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively questioning its employees about their union activities, or the activities of their family members on behalf of Drivers, Chauffeurs & Helpers Union No. 639 a/w the International Brotherhood of Teamsters or any other labor organization.

(b) Discharging employees because they engage in union activities, or because of the union activities of their family members and to discourage employees from engaging in union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employee Mayra L. Sagastume full reinstatement to her former position without prejudice to her seniority or any other rights or privileges previously enjoyed, discharging any employee, if necessary.

(b) Make Mayra L. Sagastume whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Mayra L. Sagastume, and within 3 days thereafter notify Sagastume in writing that this has been done and that the termination will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Savage, Maryland location copies of the attached notice marked "Appendix."<sup>88</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In

<sup>87</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>88</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.<sup>89</sup> Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its operations at Savage, Maryland, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 17, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 17, 2012.

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated

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<sup>89</sup> I find Respondent's notice posting location requirements and email requirements set forth above apply to locations where notices are posted for CSPC as well as ECFC employees, and that any electronic distribution of the notice should be tendered to both categories of employees. In this regard, Respondent asserts the tomato department is now managed by ECFC, but the employees remain on CSPC's payroll. The testimony of Vargas and Hernandez reveals they performed work for both entities, and Foca, the CEO for ECFC reports to CSPC CEO Corso. Foca participated in Respondent's anti-union campaign, spoke to his employees about it, and participated in the decision to discharge Sagastume.

Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT coercively question our employees about their union activities, or the activities of their family members on behalf of Drivers, Chauffeurs & Helpers Union No. 639 a/w the International Brotherhood of Teamsters or any other labor organization.

WE WILL NOT discharge employees because they engage in union activities, or because of the union activities of their family members and to discourage employees from engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employee Mayra L. Sagastume full reinstatement to her former position without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Mayra L. Sagastume whole for any loss of earnings and other benefits suffered as a result of her unlawful termination in the manner set forth in Board's decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful termination of Mayra L. Sagastume, and within 3 days thereafter notify her in writing this has been done and the termination will not be used against her in any way.

COASTAL SUNBELT PRODUCE, INC.